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COMMITTEE OF THE WHOLE

SUMMARY RECORD OF THE 27th MEETING

Held at the Headquarters of the Food and Agriculture Organization of the United Nations on Wednesday, 8 July 1998, at 6 p.m.

Chairman: Mr. IVAN (Romania) (Vice-Chairman)

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The meeting was called to order at 6 p.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (*continued*) (A/CONF.183/2/Add.1; A/CONF.183/C.1/L.53)

Part 2 of the draft Statute (continued)

1. **The CHAIRMAN** invited the Committee to continue its consideration of document A/CONF.183/C.1/L.53, and referred to the six questions to which the President had requested replies.

2. **Mr. ABDELKADER MAHMUD** (Iraq) said that the jurisdiction of the Court should cover genocide, crimes against humanity and war crimes. In the *chapeau* on war crimes, he supported option 3. In section B (o), concerning weapons, option 2 should be taken up, with the addition of a new subparagraph (vii) on weapons which contained enriched uranium. On aggression, he confirmed his support for the option contained in document A/CONF.183/C.1/L.37. If that option did not find general acceptance, the crime should not be included. Economic embargoes should be regarded as crimes against humanity. Sections C and D, concerning non-international armed conflicts, should not be included in the Statute.

3. **Mr. BOUGUETAIA** (Algeria) said that aggression had been defined by the General Assembly as a crime against international peace and should therefore be within the purview of the Court. He favoured the inclusion of treaty crimes, especially terrorism. However, a global and unified approach to such crimes was needed.

4. With regard to thresholds, under the subheading "War crimes", he agreed that the introduction to article 5 was rather restrictive. He would prefer option 2, because option 1, taken in the light of the introduction, might remove certain war crimes from the jurisdiction of the Court. On the question of weapons, he preferred option 2 under section B (o). The objection that the principle of *nullum crimen sine lege* might preclude listing some weapons because they were not prohibited under customary international law was not cogent. Moreover, the purpose of the Conference was, surely, to harmonize ethics, morality and law.

5. He was somewhat concerned about the inclusion of sections C and D, since that might lead to interference in the internal affairs of countries. It would be difficult to draw a line between a genuine armed internal conflict and internal disturbances.

6. The elements of crimes must be included, because the Court could not deal with crimes without knowing what their constituent elements were.

7. **Mr. HAFNER** (Austria) said that he was in favour of including aggression, provided that it was possible to agree on a definition. While he shared the concerns of those who had proposed the inclusion of treaty crimes, he found it difficult to support their views at the current juncture. He would like to include a text on United Nations personnel, but that should be dealt with in the framework of war crimes. With regard to the war crimes threshold, he could with hesitation accept option 2 as a compromise. Similarly, on the question concerning weapons, he could accept option 1 under section B (o) provided that subparagraph (iii) included a reference to exploding bullets and particular emphasis was laid in subparagraph (vi) on the possibility of introducing flexibility in the course of review conferences. That had to be harmonized with negotiations on articles 110 and 111.

8. The reference to internal conflicts was a sine qua non for his delegation. However, he saw no need to deal with the elements of crime, but would not refrain from cooperating on that issue, provided that the elements of crime were not incorporated in the Statute, but were addressed afterwards by the Preparatory Commission.

9. **Mr. PEREZ OTERMIN** (Uruguay) said that if the Court was to judge the most serious crimes affecting the international community as a whole, it was relevant to include genocide, crimes against humanity and war crimes. Aggression must also be included. On the other hand, it was difficult to accept the intervention of a political organ such as the Security Council in defining the existence or non-existence of a crime.

10. Owing to time constraints, it might be advisable not to consider the inclusion of terrorism, drug trafficking and crimes against United Nations personnel until a later stage.

11. His position on crimes against humanity was that attack must be defined as both systematic and generalized. As to war crimes thresholds, he preferred option 1. Most of the crimes within the purview of the Court arose in the course of internal conflicts. However, bearing in mind the concerns of some countries, the scope of those crimes in sections C and D should be more precisely defined, to make it perfectly clear that there was no intention to interfere in the internal affairs of States with fully established democratic regimes.

12. It was essential to include the elements of crimes.

13. **Mr. GAITAN MAHECHA** (Colombia) said that he preferred option 3 on the threshold for war crimes but, for the sake of general agreement, could accept option 2. He supported the inclusion of sections C and D on internal conflicts.

14. The elements of crimes should be established in a precise manner by the Preparatory Commission, to ensure strict compliance with the principle of *nullum crimen sine lege* contained in article 29 of the Statute. Although there were definitions for certain crimes such as genocide and forced disappearance in international law, those definitions had to be formulated very carefully for adoption in the Statute.

15. **Ms. LEHTO** (Finland) said that she endorsed the statement made by the representative of Austria on behalf of the European Union. It would be quite appropriate and timely for the Court to have jurisdiction over aggression, the definition of which contained in option 1 under the relevant heading of the discussion paper was acceptable. The inclusion of treaty crimes would not be advisable, and the jurisdiction of the Court should be limited to the core crimes, at least initially. The reasons were that its resources should be focused on the most serious international crimes and that there were still considerable problems of defining treaty crimes in some cases. Crimes against United Nations personnel could be included under war crimes.

16. Her clear preference on war crimes thresholds would be for option 3. However, she could accept option 2, which seemed to enjoy broad support, as a compromise. Concerning weapons, option 1 would be an acceptable compromise, in view of the support it had received. However, the *chapeau* and paragraphs 3 and 6 might still need some revision.

17. On internal conflicts, she strongly supported the inclusion of both sections C and D, as otherwise the Court would be left toothless with respect to most current armed conflicts. In her view, no further elaboration of elements of crimes under the Court's jurisdiction was necessary, but she was prepared to be flexible if the general view of the Conference was that a paper on the subject should be drafted by the Preparatory Commission, provided that the entry into force of the Statute was not delayed.

18. **Mr. CASTELLAR DUARTE** (Nicaragua) said that he agreed with the presentation of the crimes set out in article 5. With regard to war crimes, he supported the reference to both international and internal conflicts, and consequently the inclusion of sections C and D. Aggression should be included, subject to achieving a consensus on its definition. However, the role of the Security Council should be as limited as possible and should not undermine the independence of the Court.

19. Treaty crimes should be included, and he therefore supported option 1, but, in view of conflicting opinions, it might be advisable to refer the issue to a review conference. The definition of crimes against humanity was acceptable to his delegation. Genocide, as defined in the draft Statute, should be included. He hoped that consideration of the elements of crimes would not delay the entry into force of the Statute, and that subsequently those elements would be included in an annex to the Statute.

20. **Mr. Khalid Bin Ali Abdulla AL-KHALIFA** (Bahrain) said that aggression should be included, taking account of the definition in General Assembly resolution 3314 (XXIX) of 1974. He endorsed what had been said by the representatives of the Syrian Arab Republic and Egypt. At that stage, treaty crimes should not be included, because they required further consideration. Although he supported option 3 on war crimes thresholds, he could accept option 2. There should be an exhaustive list of weapons which caused superfluous injury and unnecessary suffering, or were inherently indiscriminate.

21. He found the thresholds in sections C and D difficult to accept because there was no positive definition of non-international conflicts. An exact definition of internal conflicts would be required, along the lines of Additional Protocol II to the Geneva Conventions, and great care must be taken not to interfere in the internal affairs of States. The definition must take into account situations of peace and of armed conflict, as well as situations of violence which did not amount to armed conflict.

22. There was no link between crimes against humanity and terrorism. With regard to gender-based crimes, he pointed out that the word "gender" was not defined in the English version of the discussion paper, though document A/CONF.183/C.1/L.51 contained a definition. Crimes against humanity should be considered as consisting of acts committed in a systematic and widespread way during armed conflict or, indeed, before such armed conflict.

23. **Ms. TOMIČ** (Slovenia) said that she favoured the inclusion of aggression within the Court's jurisdiction, and thus supported option 1. The reasons for the inclusion of treaty crimes, such as crimes related to drug trafficking, were quite understandable, but that question would be more appropriately dealt with later, perhaps through an early review of the Statute. There should be no threshold provision for war crimes, so that she preferred option 3, but could support option 2 as a compromise. Since she considered that jurisdiction over war crimes committed in internal armed conflicts was a necessary prerogative of the Court, she supported the inclusion of sections C and D. Section B, paragraphs (p *bis*) and (r *bis*), on United Nations personnel should be included.

24. Under section B (o) on weapons, she preferred option 3 but would be willing to work on the basis of option 1 if the words "inherently indiscriminate" were added in the *chapeau*, and if the wording from the draft Statute itself were incorporated in subparagraph (vi).

25. She was flexible about the elements of crimes, even though she remained doubtful as to the necessity of including them. However, that should in no way delay the entry into force of the Statute.

26. **Mr. PRANDLER** (Hungary) said that he associated himself with the position taken by the European Union on document A/CONF.183/C.1/L.53. He was still in favour of including aggression, if general agreement could be reached on a definition. The formulation contained in the discussion paper, although minimal, did refer to the most important elements and acts which might constitute aggression. However, in defining aggression, the prerogatives of the Security Council in determining any act of aggression must not be prejudiced.

27. Treaty crimes need not be included. As to thresholds for war crimes, option 2 was the right approach. He supported the retention of sections C and D on non-international armed conflict and regretted that several delegations were opposed to their inclusion. A great majority of the armed conflicts in the world over the past 50 years had been of a non-international character.

28. **Mr. ROBINSON** (Jamaica) said that the question of elements of crimes was perhaps the most important question to be considered. He was not entirely convinced of the need to include them at all. Other courts managed without the benefit of any detailed statement of such elements, and there was an abundance of case law. If, however, the issue was to be addressed, the proper forum was the Plenipotentiary Conference. It was not a matter for a Preparatory Commission. If the elements were to be an integral part of the Statute, they would be binding on the Court, as distinct from being merely recommendatory, and would have to be formulated before the Statute entered into force.

29. As matters stood, he would not support the inclusion of treaty crimes in the Statute, though he was open to considering any fair and reasonable resolution of the issue.

30. **Mr. NATHAN** (Israel) said that the first essential precondition for the inclusion of aggression in the jurisdiction of the Court was a precise and generally accepted definition. The second was to safeguard the position of the Security Council under article 39 of the Charter. Although option 1 spoke of attack by the armed forces of a State on the territory of another State, it completely disregarded other grave acts of aggression.

31. It would not be appropriate to include treaty crimes in the Statute. The Conventions of The Hague and Montreal provided for universal jurisdiction on treaty crimes.

32. His delegation reserved its position on section B (f), relating to the transfer of population. In particular, the references to "transfer, directly or indirectly" and the "population of the occupied territory within or outside this territory" should be deleted.

33. With regard to the war crimes threshold, he would support option 1. Article 16 of the draft Code of Offences against the Peace and Security of Mankind contained a similar threshold clause. Such a clause would certainly be appropriate for inclusion in the Statute. Section B (o) should include a specific enumeration of the prohibited weapons, because of the need for clear definitions as a matter of legal principle. Further consideration should be given to the wording of subparagraph (vi), on future prohibitions under conventional and customary law, in order to formulate an adequate and precise definition.

34. As many atrocities during recent decades had been committed in internal conflicts, it was essential that they be subject to international law, and sections C and D should therefore be included.

35. It would certainly be necessary to define the elements of crimes under the jurisdiction of the Court, to assist it in interpreting the Statute. The definitions should be contained in an annex which should form an integral part of the Statute. The drafting of such an annex should not delay the entry into force of the Statute.

36. **Ms. AGUIAR** (Dominican Republic) said that article 5 had no need of a *chapeau*, which could only undermine the strength of the Court. A listing of the crimes within the jurisdiction of the Court would be sufficient. She could agree to including aggression, so long as a clear and mutually acceptable definition could be established. The definition should stipulate the role of the Security Council. General Assembly resolution 3314 could serve as a basis for finding common understanding, because it had been adopted by a large majority of Member States.

37. In view of the state of customary law, it was perhaps not the opportune moment to include treaty crimes in the jurisdiction of the Court. However, the issue should be left open for review.

38. Both options 1 and 2 on war crimes thresholds were unsatisfactory. To kill intentionally was equally serious, whether or not it was part of a plan or general policy. She therefore favoured option 3, perhaps together with the *chapeau* of option 2.

39. She advocated including a list of weapons, materials and methods of war that caused damage or unnecessary suffering or had indiscriminate effects, the latter being the key factor. She favoured option 1, which included a potentially open list, especially in subparagraph (vi), which would make it possible to take into account technological progress in the arms industry.

40. Supporting the principle of legality expressed by *nullum crimen sine lege, nulla poena sine lege,* she said that the elements of crimes must not be left to a later stage. States parties must be sure of the commitments they were undertaking. The core crimes, however, were well defined by reference to existing instruments, thus satisfying the requirement of legality. Lastly, she was concerned that some types of crimes used as methods of war, for instance, sex abuse against women and children, were not contained in the document.

41. **Mr. R. P. DOMINGOS** (Angola) said that he strongly supported the statements made by South Africa, on behalf of the Southern African Development Community, and Lesotho, on behalf of the African Group. Genocide, crimes against humanity and war crimes should be included in the Statute. With regard to war crimes, both sections A and B were acceptable. In section B (o), he supported option 2, although he could accept option 1, given the addition of nuclear weapons and of anti-personnel mines, from option 2. He supported option 1 in both sections C and D.

42. He was not yet decided whether aggression should be included in the Statute. A clear definition was needed, so as to take account of General Assembly resolution 3314, and, particularly, the role of the Security Council. Acts committed by mercenaries should also be of concern to the international community, and as such included in the Court's jurisdiction.

43. **Ms. LA HAYE** (Bosnia and Herzegovina) said that she favoured the inclusion of aggression, provided that a wider definition was adopted, perhaps on the lines of the amended German proposal. However, if the issue continued to divide the Conference, it might be better to defer consideration. As to treaty crimes, she would favour the inclusion of crimes against United Nations personnel. On war crimes, she had a strong preference for option 3, but, in a spirit of compromise, could accept option 2. Regarding weapons, she favoured option 3, which seemed to represent the best reflection of customary international humanitarian law. However, for the sake of consensus, she could accept option 1, which contained a restricted list of prohibited weapons.

44. On internal armed conflicts, she strongly favoured the inclusion of sections C and D. She was in total agreement with Switzerland regarding the definition under customary international law of the crimes listed in section

D. There was no need for a threshold, but, if one were adopted, it should apply to war crimes committed both in international and non-international armed conflict.

45. Most elements of crimes were already established in treaty and customary international law. In defining the scope of the jurisdiction of the Court, it would be appropriate to refer to existing law.

46. **Mr. BIHAMIRIZA** (Burundi) said that he supported the inclusion of the core crimes and could also support the inclusion of aggression. Economic embargoes, which subjected the vulnerable population to great suffering, should also fall under the jurisdiction of the Court. Regarding war crimes, he favoured option 3, provided that there was a clear and exhaustive list of such crimes. As to the list of weapons prohibited under paragraph (o), he favoured option 2 but, in a spirit of compromise, would be prepared to accept option 3, provided that the list remained open. The Court should not have competence with respect to internal conflicts. He would favour defining the elements of crimes after the Conference, provided that the Statute's entry into force were not delayed.

47. **Mr. LEHMANN** (Denmark) said that it would be a most unfortunate signal to the world public if the primary crime of aggression could not be included in the Statute. The Charter was based on the need to save succeeding generations from the scourge of war. To claim that aggression could not be included in the Statute because it had not been defined was unacceptable. Furthermore, the nonsensical situation could arise that, if the Security Council referred a case of aggression to the Court, the Court would not be able to try the individuals responsible.

48. He was more flexible on treaty crimes, especially if a review clause were incorporated in the Statute. As to the question of the threshold for war crimes, the Geneva Conventions distinguished between breaches and grave breaches of international humanitarian law, the latter being war crimes. Raising the threshold to "extremely" grave breaches might undermine the whole concept behind the language of the Geneva Conventions. He could accept option 2 at the current stage of developments.

49. With regard to weapons, he could accept option 1, seen in the context of the principle of *nullum crimen sine lege*. It was essential to incorporate sections C and D. Finally, on elements of crimes, the judges and the Court needed to know exactly what was intended by the drafters. Perhaps, however, the final draft of the Statute would to some extent obviate the need for including such elements. Some might perhaps be incorporated into the Rules of Procedure and Evidence. If a third document on elements of crimes did prove necessary, it should constitute a guide to the Court. But the adoption and entry into force of the Statute should not be delayed by work on such a document.

50. **Mr. MIKULKA** (Czech Republic) said that he associated himself with the statement made by Austria on behalf of the European Union. He was firmly convinced that aggression should be included in the Statute. However, as there seemed to be no consensus on the inclusion of treaty crimes it would be better to defer consideration of that issue to a review conference.

51. It was not necessary to establish a threshold for war crimes. He therefore preferred option 3, but could accept option 2 as a compromise. The list of prohibited weapons in option 3 of section B (o) was acceptable, but again, as a compromise, he could accept option 1. Sections C and D on crimes committed in non-international armed conflict should be included in the Statute. He understood the difficulties of States not party to Additional Protocol II, but, after hearing the representative of Mexico, believed that the problem could be overcome.

52. Although not convinced that it was really necessary to elaborate elements of crimes, he would not object if that were the wish of the majority. However, their legal status, their relationship with the Statute and their form should first be clarified.

53. **Ms. DABROWIECKA** (Poland) said that she fully endorsed the remarks of previous speakers, especially Denmark and the Czech Republic on aggression, which should be included in the Statute, on the basis of the definition contained in option 1.

54. Although generally in favour of including treaty crimes, she said that they should be considered at a review conference, given the complexity of the issues involved and time constraints. She would support option 2 on the threshold for war crimes, and option 1 of section B (o) on weaponry. She reiterated her firm support for the inclusion of sections C and D in the Statute. The formulation of a text on elements of crimes should not impede the entry into force of the Statute.

55. **Mr. NGATSE** (Congo) said that the Court should have jurisdiction over genocide, as defined in the 1948 Geneva Convention, war crimes and crimes against humanity, and also over aggression. The proposed definition of aggression in the discussion paper was not satisfactory, but work on defining aggression could be continued after the Conference, provided that the crime was mentioned in the Statute.

56. He was not opposed to the inclusion of treaty crimes, since the role of the Court was to ensure legal protection for the international community.

57. Concerning crimes against humanity, he restated his view that, in the *chapeau* to paragraph 1, the term "generalized" or "systematic" might be used with reference to attacks. On war crimes, he preferred option 3, which reflected existing international law. War crimes could be committed in the context of an internal conflict and must be taken into account in article 5 of the Statute. With regard to the various options under war crimes, option 2 could be a compromise solution. He favoured option 1 of section B (o), as long as weapons of mass destruction were included. Elements of crimes should be included in the Statute. They could be established by the Preparatory Commission, provided that the entry into effect of the Statute was not delayed, or its legal status undermined.

58. **Mr. AMEHOU** (Benin) said that genocide, crimes against humanity, war crimes, and the crime of aggression should be included in the Statute. Terrorism should also fall within the jurisdiction of the Court. He suggested that consideration of the other treaty crimes should continue in the Preparatory Commission, with a view to their inclusion at a later stage. Concerning the war crimes *chapeau*, he supported option 3. The jurisdiction of the Court was already stated at the beginning of article 5. The burden of proof mentioned in options 1 and 2 would be too great for the Prosecutor. However, for the sake of compromise, he could accept option 2 if that were the majority choice.

59. On the crime of aggression, option 1 was acceptable to him. As the Court was to try individuals and not States, it would be helpful to add the phrase "of which the accused is a national" after the words "a State" in the third line of option 1 in the English text. In section B (o) on weapons, he supported option 2. Sections C and D should clearly be included in the Statute. Detailed consideration of the elements of crimes should be referred to the Preparatory Commission for further consideration.

60. **Mr. EFFENDI** (Indonesia) said that he was flexible on the issues on which he did not comment. However, crimes against humanity and war crimes, with specific reference to crimes against women, should be included in the Statute. There should be no threshold provision on war crimes. On section B (o), he preferred option 2, but option 3 might be preferable as a compromise solution. Failing acceptance of option 3, option 2 would provide a

good basis for discussion. The perpetrators of the crimes specified in sections C and D could be punished using the provisions of crimes against humanity, so that those sections need not be included. He was open to a compromise solution, in which context due account should be taken of customary international law.

61. **Ms. ASSOUMANY** (Comoros) said that she favoured the inclusion of aggression in the Statute. On war crimes, she preferred option 2. Further discussion was necessary on sections C and D on non-international armed conflicts. Crimes against humanity should include acts of terrorism, but further work was needed on a definition of the latter. Treaty crimes should be included in the Statute. Recalling her delegation's proposal in document A/CONF.183/C.1/L.46, she said that acts committed by mercenaries should be included as crimes under the Statute, because they constituted a serious threat to the stability and constitutional order of States.

62. **Mr. ASSHAIBANI** (Yemen) said that aggression should be included, with an appropriate definition. He could, in a spirit of cooperation, accept the inclusion in the Statute of war crimes committed in non-international conflicts, on the understanding that the Court's jurisdiction began when the political structure of a State collapsed totally, not just partially.

63. With regard to section B (o) on weapons, he preferred option 2. There should not be a selective approach to treaty crimes, which should therefore not be included in the Statute. Finally, he agreed that the elements of crimes should be studied in the context of the Preparatory Commission, once the Conference had been concluded.

64. **Mr. PHAM TRUONG GIANG** (Viet Nam) said that he strongly supported the inclusion of aggression as a core crime in the Statute, and noted that the last paragraph under "Aggression" mentioned that elements from General Assembly resolution 3314 might be inserted in the definition. He insisted on the retention of the words "armed conflict" in the *chapeau* under "Crimes against humanity". Serious consideration should be given to including economic and other blockades in paragraph (j) on inhumane acts.

65. To achieve a generally acceptable solution, he supported option 1 under section B (o), with the inclusion of nuclear weapons. He strongly advocated excluding sections C and D.

66. Treaty-based crimes might be punished by the international community, but, owing to time constraints, those crimes should be left, for the time being, to the national jurisdiction of the States concerned.

67. It was important to define elements of crimes, in order to give clear practical guidance. That task should be undertaken by the Preparatory Commission.

68. **Ms. KLEOPAS** (Cyprus) said that she strongly supported the inclusion of aggression under the Court's jurisdiction, though she was willing to compromise on its definition and might accept option 1 as a basis for discussion.

69. She opposed the inclusion of treaty crimes, for the reasons stated by the United Kingdom delegation. With regard to a threshold for war crimes, she was in favour of option 3, but could accept option 2 as a compromise solution. In section B (o) on weapons, she favoured option 3, but could accept option 1 as a compromise. She had no objection to the inclusion of sections C and D.

70. She saw no need to include elements of crimes in the text, and said that they could be considered at a later stage, provided that the entry into force of the Statute was not affected thereby.

71. **Mr. BHATTARAI** (Nepal) said that he favoured the inclusion of aggression in the Statute. However, an acceptable definition of that crime, as well as consideration of the role of the Security Council, were essential prerequisites.

72. Concerning treaty crimes, he supported option 1 as indicated in paragraph (e) of the *chapeau* of article 5, but could accept option 2 as a compromise, provided that there would be scope for the inclusion of those crimes at a later stage. Under the "War crimes" heading, he favoured option 2. In section B (o), he supported option 2, owing to its greater clarity. For the sake of compromise, however, he could be flexible towards option 1, with some amendments to accommodate various concerns.

73. The inclusion of sections C and D at that stage would cause difficulties for countries that were not party to Additional Protocol II to the 1949 Geneva Conventions.

74. **Mr. PALIHAKKARA** (Sri Lanka) said that he did not object to the inclusion of genocide. He agreed with the presentation of crimes against humanity contained in the *chapeau*. However, the recruitment of children into the armed forces of governmental and non-governmental entities should also be covered. It should also be made quite clear that the final words of paragraph 2 (a) under "Crimes against humanity", reading "... a State or organizational policy to commit such attack;" were also intended to cover the policy of non-governmental entities.

75. He asked whether the absence of the word "war" in the text of the provisions under "War crimes" was intended to imply that some international armed conflict was not regarded as war.

76. Concerning weaponry, he could accept option 1 of section B, paragraph (o), with the inclusion of nuclear weapons, or option 3.

77. The proposed elaboration by the Preparatory Commission of elements of war crimes would constitute a fundamental departure from the way in which general multilateral treaties were negotiated in the United Nations. However, he had no objection to the formulation of draft Rules of Procedure and Evidence by the Preparatory Commission.

78. Finding an acceptable definition of aggression was an extremely difficult task, being related to questions of Security Council vetoes or perhaps a consultative role of the General Assembly. However, he hoped that a definition could be agreed upon and included in the Statute.

79. Further consideration should be given to the inclusion of terrorism, crimes related to drug trafficking and crimes against United Nations personnel.

80. Section C on internal armed conflict was broadly acceptable, but, unless there were a complete breakdown of the judicial and administrative structure, due regard should be paid to the principle of complementarity. He had extreme difficulty with section D, largely because of the assumption that customary international law was generally applicable.

81. **Mr. MUSSAVOU MOUSSAVOU** (Gabon) said that he favoured the inclusion of the crime of aggression within the jurisdiction of the Court, since not to do so would be to ignore the cruel reality of such acts. Of course, both the nature of the crime and the role of the Security Council must be defined, the latter so as not to infringe the jurisdiction of the Court. Despite the importance of treaty crimes, the jurisdiction of a criminal court should, for the time being, be restricted to the core crimes. Under the war crimes threshold, he favoured option 3, as options 1 and

2 appeared restrictive in their scope. However, in a spirit of compromise, he could accept option 2. On the lists of crimes, if the Court had to deal with the most serious crimes, it also had to define them, so option 3 had his full support. Option 1 would be acceptable as a compromise. Armed conflicts of a non-international character should be included in the Statute. He favoured option 1 in both sections C and D. Finally, it was not necessary to include the definition of elements of crimes, because that would delay the entry into force of the Statute.

The meeting rose at 9 p.m.

The meeting was called to order at 9 p.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (*continued*) (A/CONF.183/2/Add.1; A/CONF.183/C.1/L.53)

Part 2 of the draft Statute (*continued*)

1. **Mr. NEGA** (Ethiopia) said that he strongly supported the inclusion of aggression and that, given the political will and flexibility, a definition could be agreed upon, as a number of proposals could serve as a basis for discussion.

2. He favoured the unified approach to treaty crimes and believed that terrorism should be included. The threshold for war crimes provided in options 1 and 2 was unnecessary; he therefore preferred option 3 though he might be able to accept option 2.

3. Since it would hardly be possible to make an exhaustive listing of all weapons that caused superfluous injury or unnecessary suffering or were inherently indiscriminate, he preferred the generic approach contained in option 3 of section B (o), but could support option 2.

4. Non-international armed conflicts should be included, being the main causes of crimes within the Court's jurisdiction. A form of words that would include non-international armed conflicts and would also stress the principle of complementarity could lead to a compromise.

5. **Mr. BACYE** (Burkina Faso) said that he associated himself with the remarks made by Lesotho on behalf of the African Group, as well as with the remarks made by South Africa and others. The Court's Statute should include genocide, crimes against humanity, war crimes, and aggression, although the latter was difficult to define.

6. He had reservations concerning the inclusion of treaty crimes but would be flexible if a majority emerged in favour of their inclusion.

7. He agreed to the definitions of genocide and crimes against humanity, preferred option 2 under section B (o) and supported the inclusion of sections C and D. His preference on aggression was for option 1, but a definition should be presented and the Cameroonian proposal should be examined.

8. **Mr. MAHMOOD** (Pakistan) said that, in a spirit of compromise, he supported the inclusion of genocide as a crime against humanity, though crimes against humanity occurred only in armed conflict.

9. He supported option 1 on the threshold for war crimes, since the Court would deal with exceptional situations. He could not accept the inclusion of C and D on internal armed conflicts.

10. Aggression should in principle be included in the Statute, but a proper definition was needed, and the inclusion of that crime should not be used to justify a role for the Security Council in the operation of the Court. He was prepared to examine the question of elements of crimes, provided they served only as guidelines and that the entry into force of the Statute was not delayed by any discussion on that subject.

11. **Mr. AL ANSARI** (Kuwait) said that he supported the proposal by the Syrian Arab Republic with regard to the *chapeau* of article 5.

12. The Court's jurisdiction should be confined to crimes, including crimes against humanity, that were committed in armed conflicts. He noted that subparagraph (g) of paragraph 1 under crimes against humanity mentioned the need for further discussion. There should also be references to other forms of forced sex, pregnancy and other related matters.

13. Subparagraph (h) did not take into account the reference in document A/CONF.183/C.1/L.44, indicating that the word "gender" referred to both male and female. That aspect should be highlighted.

14. He did not favour the minimum standpoint in the *chapeau* of the "War crimes" part and preferred option 2. Aggression should be included, taking into account the definition of such crimes in General Assembly resolution 3314 (XXIX).

15. If it were the general view that treaty crimes should be included, they should be defined clearly and unequivocally, particularly terrorism. His country was a party to a recent international convention on combating terrorism that contained a definition of the crime. That definition and other positive elements of the convention should be taken into account.

16. **Mr. KUZMEMKOV** (Russian Federation) said that his delegation had always been in favour of including aggression within the jurisdiction of the Court and hoped that it would be possible to agree on a definition. It should be understood that the Security Council would take the preliminary decision regarding determination of aggression.

17. He was in favour of including the most serious and dangerous acts of terrorism in the Court's Statute but would not insist. Consideration of that issue might be left to a future review conference.

18. Since the Court was to focus on the most serious crimes that represented a threat to peace and security, option 1 was the only choice regarding jurisdiction. He agreed with some delegations that there was no substantial difference between options 2 and 3, so that a compromise based on option 2 would not be easy.

19. As to weapons, he preferred option 1 under section B (o), given a development of subparagraph (vi) to include weapons which would be subject to an overall prohibition in the relevant international agreement. The text would have to be adopted by consensus, by the overwhelming majority of members of the General Assembly, or by a diplomatic conference convened under United Nations auspices. The parties to the resultant treaty should at least all be parties to the Statute.

20. In view of the polarization of views on the inclusion of conflicts of a non-international character, it would be a great achievement if section C could be included. He understood the efforts of a number of delegations to include section D, but saw little justification for that. Extending standards applied in international armed conflicts to internal conflicts could be discussed at future international humanitarian law forums. The Conference should make use of normal conventional and customary laws relating to internal conflicts, and discussion should not go beyond the framework of Additional Protocol II to the Geneva Conventions in that respect.

21. Though his country followed the continental legal system, it did not see any obstacle to developing definitions of elements of crimes for inclusion in the Statute, provided that such elements were an essential constituent.

22. **Ms. KAMALUDIN** (Brunei Darussalam) said that she supported option 2 of the war crimes *chapeau*. She also supported option 2 under section B (o) but was flexible on that point. She was willing to work towards a solution of the problem regarding differences on sections C and D and shared the majority view for the inclusion of the elements of crimes.

23. She would not object to the inclusion of drug crimes in the Statute and had an open mind on paragraph (p *bis*) with regard to rape and other sexual offences.

24. **Mr. HUARAKA** (Namibia) said that he associated himself with the remarks made by the South African representative on behalf of the Southern African Development Community (SADC) countries. He hoped that it would be possible to develop an acceptable definition of aggression so that the crime could be included in the Statute.

25. Some treaty crimes should be included, though definitions were not yet clear enough. After having heard the comments of other delegations, he preferred option 2 under the war crimes *chapeau*. He also preferred option 2 on weapons under section B (o) because that would allow the addition of weapons as yet undeveloped.

26. In common with several African delegations, he believed that the question of internal conflicts must be addressed, since in one case the entire Government had been involved in genocide and the judicial system *in situ* had not been effective.

27. Efforts to develop certain elements such as jurisprudence should not delay efforts to adopt the Statute and establish the Court.

28. **Mr. SCHEMBRI** (Malta) said that he supported the inclusion of aggression and that option 1 under that heading could serve as a reference point for further discussion in order to establish individual criminal responsibility.

29. Under paragraph 1 of article 10 on the role of the Security Council, he supported option 1.

30. He favoured the inclusion of sections C and D, since international law had developed to a point where individuals could be held criminally responsible for serious violations of humanitarian law in non-international conflicts.

31. He strongly disagreed with the limitation of the Court's jurisdiction embodied in option 1 of the war crimes *chapeau*, and said that the Prosecutor should be able to prioritize and choose the more serious crimes and that it was the duty of the Court to take into account the gravity of a crime in determining a sentence. The words "shall have jurisdiction in particular when committed as a part of a plan or policy" in option 2 were ambiguous: either the Court had jurisdiction or it did not. However, in a spirit of compromise, he would be prepared to be flexible.

32. He was also ready to compromise on treaty crimes, which might be dealt with in a review conference.

33. **Mr. FLORIAN** (Romania) said that aggression must be included if a generally agreed definition could be obtained and if there were clear provisions regarding the role of the Security Council.

34. His delegation had no strong views on treaty crimes but preferred that the Court deal only with core crimes. He supported the inclusion of sections C and D. On the question of weaponry in section B (o), he preferred option 1, though further discussion was still needed on subparagraph (vi).

35. Consideration of elements of crimes could be deferred to a future Preparatory Commission meeting. Though he did not believe it necessary to have a threshold for war crimes, he could accept option 2 as a compromise.

36. **Mr. BALDE** (Guinea) was in favour of including genocide, crimes against humanity and war crimes within the Court's jurisdiction. However, there were difficulties regarding the definition of aggression and the preponderant role of the Security Council in that context. He associated himself with the statement made by the delegation of Lesotho on behalf of the African Group.

37. He preferred option 3 regarding a threshold for war crimes, as it seemed more appropriate to deal with the full range of such crimes. It would be premature to include nuclear weapons under section B (o) as there was no treaty banning them, so that he preferred option 1.

38. In view of the Ottawa Convention, anti-personnel mines should be included under subparagraph (vi) of option 1, Section B (o).

39. **Mr. MORSHED** (Bangladesh) said that he opposed option 2 on aggression but supported option 1. Treaty crimes should be included, but his delegation was flexible regarding the relevant procedure. Since his country's law had no provision for a threshold for war crimes, he favoured option 3 but could accept option 2.

40. He supported option 2 of section B (o) as a basis for continued discussion. In section C, he supported option 1 but believed that a broader agreement could be achieved by stipulating a higher threshold. On section D, option 2 would facilitate consensus.

41. There were so many substantive and procedural implications regarding elements of crimes that it would probably be impossible to find an ad hoc answer to their inclusion.

42. **Ms. VEGA** (Peru) said that she supported the inclusion of genocide as defined in the 1948 Geneva Convention, and of the category of mass or heinous crimes. She hoped that an acceptable definition of aggression would be worked out, particularly as to the role of the Security Council. In the war crimes *chapeau*, she preferred option 3. With regard to sections A and B, it was most important to classify the elements of crimes so that the Court could properly deal with offences. She agreed with Mexico that there should be further endeavours to round out the offences aspect. Although the matter was complex and various international instruments already existed on treaty crimes, her delegation was flexible with regard to their inclusion.

43. **Mr. ROCHEREAU** (France) said that his country had always supported the inclusion of aggression and was in favour of the option which provided a strict definition and preserved the prerogatives of the Security Council.

44. His country had a very reserved position on the inclusion of treaty crimes, since they were of quite a different nature from the core crimes. Though other international instruments were already in force with regard to treaty crimes, he did not rule out an imaginative solution.

45. His country joined the emerging consensus on option 2 with regard to the war crimes threshold and was prepared to accept the drafting proposed by the Chair for (a *bis*) and (b) of section B. However, he considered that the provisions taken from Additional Protocol I should be read in the light of the declarations by States parties to that Protocol.

46. His delegation preferred option 1 of section B (o) and supported the comments made by the United Kingdom delegation on subparagraph (vi) of that paragraph. He agreed with the comments made by the Austrian representative on behalf of the European Union with regard to sections C and D.

47. In a spirit of compromise, he was prepared to help ensure that the adoption of the text on elements of crimes did not delay the establishment of the Statute.

48. **Mr. NIYOMRERKS** (Thailand) supported the inclusion of aggression in the Statute and preferred the relevant option 1. However, the role of the Security Council should be mentioned, as well as that of the General Assembly, as in the uniting for peace resolution. The text of option 1 would have to be improved to reflect those elements.

49. Treaty crimes should also be included, but, in view of time constraints, it might be preferable to consider them at a review conference, if a provision to that effect were reflected in the documents of the Conference.

50. His delegation supported option 1 in the war crimes *chapeau* but would be prepared to accept option 2 if a consensus emerged. With regard to section B (o), he supported the explicit inclusion of nuclear weapons contained in subparagraph (vi) under option 2. However, he would be prepared to join in a general consensus on option 1 if a reference to the use of nuclear weapons could be included as explicitly as possible.

51. He could not accept sections C and D but supported the inclusion of elements of crimes, given consistency with the Statute and the relevant conventions.

52. **Mr. ZABALLA GOMEZ** (Spain) said that he associated himself with the remarks by the representative of Austria on behalf of the European Union.

53. He supported option 1 on aggression which, though rather restrictive, addressed the concerns of various countries.

54. Since no consensus seemed to be emerging on treaty crimes, they should not be included in the Statute, though a subsequent review might be possible. Crimes against United Nations personnel were not treaty crimes in the strict sense but were being discussed in the context of war crimes. On that understanding, he supported their inclusion. In the war crimes *chapeau*, he supported option 2, which used the words "in particular", as it might command consensus. He supported option 1 in section B (o) on prohibited weapons, which had been substantially improved, particularly with regard to the role of the Assembly of States Parties in determining what weapons should be prohibited.

55. War crimes committed in conflicts of a non-international character should also be dealt with; he therefore supported the inclusion of sections C and D. A consensus seemed to be emerging on that point.

56. There were some positive aspects in the list of elements of crimes but difficulties might arise in seeking to obtain consensus, which might impede the entry into force of the Statute. He therefore welcomed the efforts made by the United States delegation to avoid any such eventuality.

57. **Mr. PADILLA** (Guatemala) said that he would welcome a solution for including the crime of aggression, along the lines of the Mexican suggestion. If that were impossible, he could agree to option 1, for the reasons expressed by France, among others.

58. Since his country had ratified the two Additional Protocols to the Geneva Conventions, he was prepared to accept the inclusion of sections C and D. However, if, as mentioned by the Mexican delegation, common article 3 could be used to resolve the difficulties of countries that had not signed Additional Protocol II, that would also be acceptable to him.

59. He did not favour the mention of thresholds with regard to war crimes, but if that concept had to be included in order to reach a consensus, he would prefer option 2.

60. As the depositary of the Tlatelolco Treaty, he favoured option 2 under section B (o) on prohibited weapons, since it included both nuclear weapons and anti-personnel mines. The difficulties of some delegations might be met if it were considered that nuclear weapons were regarded as essentially prohibited for use in attack but not in defence. However, for the sake of a compromise, he could accept option 1.

61. If necessary in order to arrive at a consensus, terrorism and attacks against United Nations personnel could be left aside for the time being.

62. Correct definition of the elements of crimes was absolutely essential.

63. **Mr. FADL** (Sudan) said that he supported the inclusion of section B (f). For reasons he had already mentioned, he thought that section D should be deleted.

64. The phrase "not military objectives" in section B (c) was not satisfactory and the original draft was preferable. He would elaborate further on that point in consultations with other delegations. He supported the Egyptian delegation's statement concerning Additional Protocol II to the Geneva Conventions. If the language contained in those Conventions were not included, it would complicate the problems with regard to sections C and D. The Court would be impartial if internal conflicts were subject to the criterion of admissibility and the powers of the Prosecutor and States parties were also subject to that criterion.

65. He supported inclusion of the crime of aggression but said that, if there were no definition of the crime, perpetrators would not be prosecuted.

66. **Mr. BALLACILLO** (Philippines) said that he favoured the inclusion of aggression in the Statute, subject to a clear definition. Treaty crimes should also be included, though he would be willing to consider the views of other delegations.

67. No qualification or conditions should be required with regard to a threshold on war crimes. He therefore supported option 3. With respect to weapons of a nature to cause superfluous injury and unnecessary suffering, he supported option 2 of section B (o).

68. He was in favour of retaining sections C and D on armed conflict of a non-international character.

69. He supported automatic jurisdiction of the Court over core crimes and an opt-in or State-consent regime for other crimes. Accordingly, he also advocated according *proprio motu* power to the Prosecutor over core crimes, subject to adequate safeguards.

70. **Mr. LARREA DAVILA** (Ecuador) said that the Court should have universal jurisdiction over the core crimes. Aggression should be included in the Statute, with proper regard for legality and international jurisdiction and law. A clear statement should be made about the role of the Security Council, in order to guarantee the independence of

the Court in applying the principle of complementarity. With regard to the question of thresholds, his delegation thought option 3 was the most acceptable. As to the use of weapons and methods causing superfluous injury or unnecessary suffering specified in section B (o), his delegation considered that option 3 was best; however, if option 1 could command consensus, he could support it, but in that case more work would have to be done on subparagraph (vi).

71. His delegation supported the inclusion of sections C and D.

72. **Mr. DOUDECH** (Tunisia) said that he associated himself with the statements made by the representative of Lesotho on behalf of the African Group in reply to the questions posed by the Chair. He also supported the inclusion of terrorism in the Statute as a crime against humanity and would like to see the adoption of a generally agreed text. Similarly, he supported the inclusion of other treaty crimes and the crime of aggression. On that, as on other issues, a consensual approach would be necessary, taking into account the viewpoints of various delegations and ensuring the adoption of a Statute that would find broad support.

73. **Mr. PERALBA GARCIA** (Andorra) said that aggression should be included but must be properly defined, taking into account the role of the Security Council. He supported the Belgian proposal that treaty crimes be mentioned in the Final Act as a subject for a later conference.

74. His original view on thresholds was that they were not needed, but, after listening to the arguments put forward by the United States, he considered that option 2 would be an acceptable compromise. In section B (o) on weapons, he supported option 1. Sections C and D should be included in the Statute.

75. He recognized that some delegations needed a provision on elements of crimes but thought that the matter should be considered later in order not to hinder the work of the Conference.

76. **Mr. SOARES DA GAMA** (Guinea-Bissau) said that he supported the statements by Lesotho on behalf of the African Group in favour of including the core crimes within the jurisdiction of the Court. A satisfactory definition of aggression was also needed.

77. Since it seemed difficult to arrive at general agreement on treaty crimes, he preferred option 2 under article 9 of the draft Statute. On the question of thresholds in the context of war crimes, he preferred option 3 but could accept option 2. Under section B (o), he could agree to option 1. Elements of crimes could be established after the Conference, provided the entry into force of the treaty establishing the Court would not be hampered thereby. He attached prime importance to the inclusion of sections C and D, since his country continued to suffer from non-international armed conflicts.

78. **Mr. MONAGAS** (Venezuela) said that he supported the inclusion of aggression on the basis of a clear and specific definition and considered that the definition contained in document A/CONF.183/C.1/L.53 under option 1 was acceptable.

79. Since the Court was to be a new body, its initial jurisdiction should cover core crimes. He supported the idea of a future review mechanism for including such offences as treaty crimes.

80. Under section B (o), he preferred option 2, which included nuclear weapons and anti-personnel mines. He understood the difficulties of some delegations on that issue and could join in a consensus based on a definition that would make some reference to that category of weapons. He supported the inclusion of sections C and D.

81. The Statute should contain some indication that the Preparatory Commission should prepare texts on elements of crimes, after the closure of the current Conference. His delegation agreed to the automatic jurisdiction of the Court for genocide in accordance with the 1948 Convention but thought that the consent of States parties would be called for with regard to other crimes. He therefore supported option 1 of article 7.

82. **Mr. AL-AMERY** (Qatar) said that he accepted the inclusion of aggression as one of the core crimes, but that there must be a precise definition linked to General Assembly resolution 3314. He favoured option 3 in the war crimes *chapeau* but could support option 2.

83. On section B (o), he preferred option 2 because it included nuclear weapons and anti-personnel mines. So far as sections C and D were concerned, the Court should not have jurisdiction if States were correctly performing their duties.

84. A provision should be included concerning elements of crimes. In his understanding, the word "gender" in paragraph 1 (g) under crimes against humanity referred to both males and females.

85. **Mr. AL SHEIKH** (Saudi Arabia) said that aggression must be included within the jurisdiction of the Court, taking into consideration the definition contained in General Assembly resolution 3314.

86. Under section B (o), he preferred option 2 because it included a number of weapons whose use should be criminalized.

87. With regard to crimes against humanity, he pointed out that paragraph 1 (g) of the discussion paper said that further discussion was needed on that point. His preference was for the corresponding subparagraph (g) in the draft Statute, which mentioned rape, other sexual abuse and enforced prostitution but omitted other elements which might be controversial.

88. War crimes should be included, being grave violations of the Geneva Conventions and of Additional Protocol I. However, internal conflicts should be excluded, provided that a State was correctly meeting its obligations. The intervention of the Court would prejudice State sovereignty.

89. He had no objection to the inclusion of terrorism as defined in the recently adopted Arab convention on combating terrorism.

90. **Mr. Sayyid Said Hilal AL-BUSAIDY** (Oman) said that he was in favour of an effective, balanced and independent court with jurisdiction over genocide and crimes against humanity committed during armed conflicts. He favoured option 2 in the war crimes *chapeau* and also preferred option 2 in section B (o) on weapons.

91. Aggression should be included within the Court's jurisdiction, General Assembly resolution 3314 being the basis for a definition, and the Security Council's role in bringing a case should also be clearly defined. On the basis of the principle of uniting for peace, the General Assembly should also have jurisdiction in cases where a veto had been used.

92. Internal conflicts should not come within the Court's jurisdiction, except in the case of a non-functioning Government or central authority. However, he was flexible on that point.

93. Elements of crimes should be within the jurisdiction of the Court.

94. **Mr. BELLO** (Nigeria) said that he favoured the inclusion of the core crimes in the Statute. Under crimes against humanity, he favoured the inclusion of paragraph 1 (I) (*bis*) on apartheid. His delegation favoured option 1 in the war crimes *chapeau*. He also favoured option 2 of section B (o), since it was essential to include nuclear weapons and anti-personnel mines.

95. His acceptance of paragraphs (p *bis*), (r *bis*) and (t) would depend on the existence of acceptable definitions. He also supported the inclusion of aggression, if acceptably defined.

96. He would be grateful if the options referred to by the Syrian delegation at a previous meeting, which were not contained in the discussion paper, could be presented for further deliberation, in order to reach a consensus on defining aggression and also on the role of the Security Council.

97. It was necessary to consider not only aggression by States but also by armed bands against States. His country had sponsored a motion leading to a United Nations Convention against the Recruitment, Use, Training and Financing of Mercenaries. That should be reflected in the final consensus.

98. Without prejudice to the powers of the Security Council under the Charter, the General Assembly and/or the victim of aggression should have the right to refer a matter to the Court.

99. Though he sympathized with the desire to include treaty crimes, the list proposed was selective. Treaty crimes should be left to national courts.

100. His delegation favoured the elaboration of elements of crimes; relevant provisions should be included in the Statute.

101. **Ms. SHAHEN** (Libyan Arab Jamahiriya) said that the discussion paper did not reflect the principle of an independent, balanced and effective court that would hand out justice to all without any political influence.

102. The definition of aggression contained in option 1 was not comprehensive, confining itself to annexation and occupation, and option 2, excluding aggression, was unacceptable. Furthermore, the Court should not be prevented from exercising its jurisdiction in the event of a Security Council veto. The right of Members of the Security Council to refer cases to the Court was an entrenchment of domination.

103. Although her delegation said it was necessary to include aggression, it could not accept option 1 in the discussion paper and preferred the option in document A/CONF.183/C.1/L.37.

104. Embargo should be included as one of the crimes against humanity, in view of the suffering that it caused. She did not wish to see treaty crimes included and had no preference with regard to the war crimes *chapeau*, but preferred option 2 of section B (o). Sections C and D should not be included. She was ready to consider guarantees that would secure the integrity and sovereignty of States.

105. The question of elements of crimes should be considered at a later stage.

106. **Ms. DOSWALD-BECK** (Observer for the International Committee of the Red Cross), also speaking on behalf of the International Federation of Red Cross and Red Crescent Societies, said that war criminality did not admit a threshold provision. She recognized the desire to limit the jurisdiction of the Court to certain situations, so that option 2 did not seem to be a negative compromise. With regard to the list of crimes, she pointed out a problem with

regard to the word "perfidy", mentioned in section B (e). Perfidy in that context could apply only to objects to which the adversary had to give special humanitarian protection, but not to the uniform of an enemy. The correct word in the context in question would be "improper" rather than "perfidious".

107. Option 3 of section B (o) reflected existing law on weapons. However, if States were to choose option 1 or 2, it should be ensured that existing law was protected, in which context she considered subparagraph (vi) of option 1 to be extremely important. Bullets exploding in the body had long been prohibited and should therefore feature in (iii) of either option 1 or 2, or must be understood as covered by the word "expand".

108. Crimes committed in non-international armed conflicts were crimes under international customary law. She appealed to States to consider each crime separately and identify what conduct should be considered as criminal. Atrocities that had occurred in recent armed conflicts should also be taken into account. The input of States that had experience of internal armed conflicts would be very meaningful.

109. Certain safeguards did exist with regard to non-international armed conflicts, namely, with regard to the lower thresholds. It was necessary to distinguish between armed conflict and internal riots, for example. The normal interpretation was that a non-international armed conflict must be an armed confrontation of a military nature, which excluded sporadic events.

110. With regard to complementarity, she noted the valid concern of many States that governments should themselves be able to deal with crimes committed in internal armed conflicts. She therefore believed that the Court should have jurisdiction over such crimes only if the national authorities failed to do so.

111. It was extremely important to include a provision such as article Y of the draft Statute in order to protect existing humanitarian law and its development, under both treaties and custom.

The meeting rose at 10.55 p.m.

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COMMITTEE OF THE WHOLE

SUMMARY RECORD OF THE 29th MEETING

Held at the Headquarters of the Food and Agriculture Organization of the United Nations on Thursday, 9 July 1998, at 10.15 a.m.

Chairman: Mr. P. KIRSCH (Canada)
later: Mr. MOCHOCHOKO (Lesotho) (Vice-Chairman)

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The meeting was called to order at 10.15 a.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (*continued*) (A/CONF.183/2/Add.1; A/CONF.183/C.1/L.53)

1. **The CHAIRMAN** invited the Committee to take up the second set of questions in discussion paper A/CONF.183/C.1/L.53, on other jurisdictional issues, admissibility and applicable law.

2. **Mr. KOURULA** (Finland), Coordinator, said that practically the same order of provisions was followed in the discussion paper as in the draft Statute. As to the exercise of jurisdiction, three triggering mechanisms were provided in the discussion paper. With respect to the Prosecutor's right to initiate an investigation, there were two options in article 6 and two in article 12. On the basis of earlier debate in the Committee of the Whole, the term "situation" was used in article 6.

3. In article 7, covering preconditions to the exercise of jurisdiction, and automatic jurisdiction, it might have been preferable to reverse the order of paragraphs 1 and 2. The existing order had probably been chosen because paragraph 1 might apply both to article 7 (2) and to possible "opt-in" jurisdiction. The article governed preconditions to the exercise of jurisdiction, if needed. Furthermore, as the note in bold type stated, if the Statute were to provide for automatic jurisdiction for some crimes but an "opt-in" or "State consent" regime for others, then consequential amendments to paragraph 1 would be required, and the placement of subsequent provisions would be reconsidered.

4. Article 7 (2) dealt with automatic jurisdiction, while elements for the "opt-in" mode were contained in article 7 *bis*. Article 7 *ter* contained a provision concerning the acceptance of the jurisdiction of the Court by a non-party.

5. On the issues relating to the Security Council, he recalled that the Committee had already discussed the question of aggression and would have to deal with coordination between the Court and Security Council action.

6. Article 11, "Referral of a situation by a State", was a technical issue.

7. Consultations continued on the issues pertaining to admissibility, especially with respect to article 16.

8. With regard to article 20, a special working group had been established on the previous day to consider issues that remained open.

9. **The CHAIRMAN** said that the Bureau had requested comments on the following issues:

(1) Acceptance of jurisdiction; automatic jurisdiction; opt-in or State consent for one or more core crimes;

(2) What States must be party to the Statute or had to have accepted jurisdiction before the Court exercised jurisdiction;

(3) An approach to the *proprio motu* power of the Prosecutor to initiate proceedings and the safeguards required;

(4) An approach to the role of the Security Council on issues other than aggression that could form the basis for general agreement.

It would not be useful to go into article 20 at the current meeting, since it was being discussed by the working group just established.

10. Delegations were invited to make other suggestions, which, he hoped, would be helpful in reaching general agreement.

11. **Ms. WILMSHURST** (United Kingdom) said that, with respect to the Chairman's first question, the United Kingdom strongly believed that there should be automatic jurisdiction: if a State became a party to the Statute, it should thereby accept the Court's jurisdiction on all the core crimes within the Court's remit. She assumed that treaty crimes would not be included.

12. On the second point, namely, the difficult question of non-parties, she said that her delegation still believed that its own proposal (option 2 for article 7 in the discussion paper) could achieve consensus.

13. On the question of the Prosecutor, her delegation was in favour of provisions that would support and protect his or her independence and the authority of the office. Appropriate checks and balances should therefore be included to afford such protection as States might require in the light of all the provisions of the Statute, including the principle of complementarity. Her delegation was prepared to work on provisions to meet those objectives.

14. With regard to the role of the Security Council, her delegation believed that the only sensible course would be to allow the Council to refer cases to the Court, since the establishment by the Council of new ad hoc tribunals should be avoided. With regard to deferral by the Court on request of the Council, her delegation considered that some such provision as option 1 in article 10 (2) would be a good solution.

15. With regard to the issue of complementarity under article 15, she hoped that the current wording of that article could be retained in view of the difficult negotiations that had taken place in the Preparatory Committee.

16. **Mr. PERRIN DE BRICHAMBAUT** (France) said that his delegation had two considerations in mind with regard to the Chairman's four questions. First, the Court should have the widest possible membership. Since a variety of situations existed in different States and not all States were ready to accept the Court's inherent jurisdiction over their nationals for all crimes, a way had to be found of allowing the greatest possible number to participate.

17. Second, the Court would be successful if it worked in a spirit of harmony and trust with existing international institutions, particularly the Security Council. It was therefore important to look again at the methods of cooperation set out in the Statute.

18. In reply to the Chairman's first question, he said that France believed that the Court should have mandatory jurisdiction for all States parties with regard to genocide, crimes against humanity and aggression. For war crimes, consent by the State of which the accused was a national would be preferable. A flexible system allowing each State to accept the Court's jurisdiction for a given crime would meet the concern of his and other delegations. His delegation would therefore propose an additional paragraph to article 7 *bis* to cover that point.

19. Regarding the Chairman's second question, his delegation was in favour of a compromise solution combining parts of options 1, 2 and 4 for article 7.

20. With regard to the role of the Prosecutor, France had already agreed to the idea of referral to the Court by joint decision of the Pre-Trial Chamber and the Prosecutor, which was reflected in option 1 for article 12.

21. On the role of the Security Council, his delegation was in favour of option 1 for article 10 (1) and for 10 (2). The Security Council's prerogatives under the Charter to determine acts of aggression had to be respected, while at the same time the action of the Court and that of the Security Council had to be consistent in situations where there was a threat to or breach of the peace.

22. **Mr. BROWN** (Trinidad and Tobago) said that automatic jurisdiction for all core crimes was absolutely essential. It might be supplemented by opt-in jurisdiction over treaty crimes such as drug trafficking.

23. As to the preconditions for the exercise of jurisdiction under article 7, his delegation considered that option 1 was the best of those presented in the discussion paper, although it would have preferred the universal jurisdiction formula proposed by the German delegation.

24. His delegation strongly supported the power of the Prosecutor to initiate investigations *proprio motu* and therefore preferred option 2 in article 6 (c). Adequate safeguards would be provided by the Pre-Trial Chamber under article 12, option 1, article 17 and article 58.

25. Trinidad and Tobago accepted that the Charter recognized the Security Council's role in dealing with aggression, but sympathized with the view that there was no need for an exclusive role of the Council. His delegation supported the Council's right to refer situations to the Court under article 6 (b), but wondered whether the General Assembly should not be granted similar authority as well, since a State party had that right under article 6 (a).

26. His delegation could accept that the Security Council, acting under Chapter VII of the Charter, might need to request a temporary suspension of an investigation or prosecution by the Court under extraordinary circumstances. However, such suspensions should be limited to a period of six months and be renewable only once.

27. **Mr. CAFLISCH** (Switzerland), replying to the Chairman's first question, said that the Court's jurisdiction over all core crimes must be automatic. His delegation considered option 1 for article 7 to be an acceptable compromise.

28. As to what States had to be parties to the Statute if the jurisdiction of the Court was to be established in a given case, in his delegation's view that requirement should apply to the State where the suspect was located rather than to the custodial State, because a suspect could be located in a State but not in custody. However, for the sake of compromise, he could accept option 1 for article 7.

29. With regard to the role of the Prosecutor, his delegation supported option 1 for article 12. To prevent any possible abuse, the independent exercise of the Prosector's activities might be subject to control by the Pre-Trial Chamber.

30. With regard to the Security Council's role on issues other than aggression, his delegation considered that the Council should never serve as a filter to prevent matters from being referred to the Court. Nor should the Prosecutor be obliged to notify the Council whenever a State submitted a case to the Court. However, the Council might well

wish the Court to defer consideration of a case for a certain period, but that period should not be too long and should not be used to remove or destroy evidence.

31. His delegation could therefore accept option 2 for article 10.

32. **Mr. OWADA** (Japan), replying to the Chairman's first question, said that Japan considered that the Court's jurisdiction should be confined to core crimes but should be automatic. Treaty crimes should not be covered by the Statute and his delegation was therefore not in favour of the system set out in article 7 *bis*. None the less, his delegation would try to promote general agreement on that matter since it was important to achieve the widest possible participation in the Statute.

33. His delegation had no objection to article 7 *ter*, which set out the guiding principle for acceptance of jurisdiction.

34. With regard to the second question, Japan considered it important to have the cooperation of the custodial State and also that of the State on whose territory the act or omission had occurred. It was therefore in favour of option 3 but was prepared to listen further to the views of other delegations.

35. Concerning the power of the Prosecutor to initiate investigations *proprio motu*, Japan considered it important that the Prosecutor should act strictly in accordance with the law and that he or she should be totally free from any influence by a country or group. However, the Court's Prosecutor would not be like a prosecutor in a national judicial system, who had legitimacy backed by accountability under that system. In the international context, the Prosecutor had to reflect the legal interest of the international community, and it was therefore important to provide a mechanism ensuring the legitimacy of his or her action. Bearing those considerations in mind, Japan would continue to seek a formula acceptable to all.

36. His delegation was in favour of option 1 for article 10, with regard to both aggression and deferral.

37. **Ms. FERNANDEZ de GURMENDI** (Argentina) said that her delegation considered that the Court should have automatic jurisdiction over all crimes within its jurisdiction: genocide, crimes against humanity, war crimes and the crime of aggression, if the latter was included. Any system of opt-in or State consent would undermine the Court's independence and effectiveness.

38. As to what States had to be parties to the Statute, her delegation preferred option 1 for article 7.

39. Her delegation was in favour of giving the Prosecutor power to initiate proceedings *proprio motu*, and of the system of Pre-Trial Chamber control set out in article 12.

40. Her delegation believed the Council's ability to submit issues to the Court to be important. With regard to the question of deferral, her delegation considered that option 1 in article 10 (2) provided a good basis for compromise.

41. **Mr. SCHEFFER** (United States of America) said that his delegation strongly supported option 2 for article 6 for reasons already explained. Option 1 would weaken the Court in practice and would discourage many Governments from joining it.

42. If the principle of universal jurisdiction were adopted, many Governments would never sign the treaty and the United States would have to actively oppose the Court. The principle of universal jurisdiction was not accepted in

the practice of most Governments and, if adopted for the Statute, would erode the fundamental principles of treaty law. The possibility that the Court might prosecute the officials of a State that was not a party to the treaty or had not submitted to the Court's jurisdiction in other ways was a form of extraterritorial jurisdiction that would be quite unorthodox. His delegation therefore rejected options 1, 2 and 3 for article 7 and strongly supported option 4, which required the prior consent of the State of nationality of the accused if that State was not a party to the treaty. The United States had grave difficulties with establishing a court that presumed to have jurisdiction over the citizens of a State that had not ratified the treaty creating it, except in situations where the Security Council had taken enforcement action under Chapter VII of the Charter, which was binding on all Member States. Options 1, 2 and 3 did, however, contain elements that could be added to option 4 if desired.

43. With respect to automatic jurisdiction, his delegation believed that any State party to the Statute should, by virtue of its ratification of the treaty, accept the Court's jurisdiction over genocide. The crime mentioned in article 7 (2) should therefore be "genocide". Automatic jurisdiction over all the core crimes was a recipe for limited participation in the Court. A better solution might be an opt-in provision to allow States parties to accept the Court's jurisdiction over crimes against humanity and war crimes, as proposed in article 7 *bis*. That approach would encourage broad membership in the Court. Moreover, the principle of complementarity should apply with respect to all crimes within the Court's jurisdiction.

44. Article 7 *ter* was a useful and necessary provision.

45. His delegation strongly supported article 8 (1 *bis*), without which many States would be reluctant to join the treaty.

46. With respect to article 10 (1), his delegation considered that option 1 was essential. Contrary to some suggestions, the General Assembly was not equivalent to the Security Council as far as the Council's responsibilities under the Charter were concerned.

47. His delegation had long supported the proposal in the original International Law Commission (ILC) text requiring affirmative action by the Security Council before a complaint concerning a matter under consideration by the Council could be addressed by the Court. However, it realized that a consensus was unlikely on that point.

48. His delegation was examining wording that might better achieve the objective of section 2 of article 10. In view of the Council's responsibilities under the Charter for restoring and maintaining international peace and security, recognition of its role in the Statute was vital to the proper functioning of the Court, in accordance with the obligations of Member States under the Charter. His delegation was willing to work with others to find a compromise with respect to the Council's proper role, but the powers and functions of the Council must not be rewritten. Wording was needed that did not impose an obligation on the Council to draft its own resolution with a specified period for its applicability. Nevertheless, his delegation supported efforts to find consensus.

49. With respect to article 11, his delegation believed that option 1 for paragraph 3 was a necessary provision for coordination between the Court and the Security Council.

50. His delegation supported the deletion of article 12.

51. The United States delegation had already explained its proposal regarding article 16, and was prepared to review it with other delegations so that the text could be finalized. That was a relatively minimal proposal but would encourage broader membership in the Court because it strengthened the principle of complementarity.

52. If the approaches he had suggested made up an acceptable package, his delegation would seriously consider recommending that his Government should sign the treaty at an appropriate time in the future.

53. **Mr. MEDDAH** (Morocco) said that his delegation had no problem with including genocide, crimes against humanity and war crimes within the jurisdiction of the Court.

54. Aggression was political in nature and had not been clearly defined. It should therefore be excluded from the Court's jurisdiction, and the same applied to other crimes which were not of extreme gravity. To ensure that the Court could be independent and effective, the Prosecutor should be given all powers to carry out his or her responsibilities effectively and should be subject to no control other than that of the Statute and the Court itself.

55. **Ms. VARGAS** (Colombia) said that her delegation supported automatic jurisdiction for genocide, war crimes and crimes again humanity. If consensus was reached on the inclusion of treaty crimes, an express declaration of acceptance of the Court's jurisdiction would be necessary.

56. Her delegation was in favour of option 3 for article 7 regarding States that should be parties or have accepted jurisdiction before the Court exercised its jurisdiction. In other words, both the territorial State and the custodial State must have accepted the Court's jurisdiction, but, as a compromise, she could agree to a combination of options 3 and 4, thus including the State of nationality of the accused.

57. With regard to the power of the Prosecutor to initiate proceedings, her delegation supported article 12, which provided for control by the Pre-Trial Chamber.

58. As to the Security Council's role on issues other than aggression, she reiterated her country's position that the Council should not intervene in the functioning of the Court.

59. **Mr. DABOR** (Sierra Leone), speaking in connection with article 6, said that his delegation considered it imperative that the Prosecutor should be able to initiate investigations and was therefore in favour of option 1 for article 6 (c). With regard to article 12, his delegation's preference was for option 1.

60. On article 7, his delegation considered that the Court should have automatic jurisdiction over all the core crimes. It regretted that universal jurisdiction had been eliminated from the choices. Paragraph 2 of article 7 should become paragraph 1 and the word "of" should be deleted, so that paragraph would read: "A State which becomes Party to the Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5". His delegation preferred option 1 for article 7 because it was selective rather than cumulative.

61. His delegation called for the deletion of article 7 *bis*, because there should be no opt-in for core crimes. It did not consider that treaty crimes should be included at that time, so that an opt-in system with regard to those crimes would be unnecessary.

62. His delegation was in favour of including article 7 *ter* since it would allow non-parties to cede their jurisdiction to the Court when a crime of the most serious concern to the world community had been committed.

63. Referring to the role of the Security Council, he said that his delegation would prefer option 2 for paragraph 2 of article 10 if the deferral period was shorter, namely, six months rather than twelve. Moreover, a revised version should make provision for the concerns of Belgium about the preservation of evidence; the term "evidence" should be interpreted broadly enough to cover witness and victim protection. His delegation considered that the deferral

request should be renewable only twice if it was for a duration of six months, or once if it remained at twelve. Numerous renewals or indeterminate delays might subject accused persons to lengthy detention prior to or during a trial, and would thus prejudice the right to a fair trial. His delegation also supported the New Zealand proposal that any decision for deferral be taken by a formal resolution of the Security Council. However, in a spirit of compromise, his delegation would adopt a flexible attitude on option 1 and would welcome further consultations on the issue.

64. In connection with article 11 (3), his delegation would prefer that there should be no direct interference by the Security Council in the proceedings of the Court. Option 1 might be understandable if the Court were to be an organ of the United Nations, but as a treaty-based organization, notification to the Council was inappropriate; option 2 was therefore preferable.

65. With regard to article 15, his delegation preferred that the text should remain as it stood, since it was the result of a very delicate compromise.

66. His delegation was against the inclusion of article 16, which merely set up another procedural obstacle to the operation of the Court. Taken as a whole, articles 15, 16 and the possibility of an article 17 would create a system full of checks without any balance. His delegation therefore considered that, if article 16 were included, there must be automatic jurisdiction over the core crimes and the article would need serious improvement.

67. Article 19 raised an important issue and should be included in the Statute. However, in the interests of compromise, his delegation would agree to its deletion.

68. **Mr. GADYROV** (Azerbaijan) said that, in principle, he favoured automatic jurisdiction but, if a particular State or group of States were allowed to select several modes of jurisdiction, his Government would reserve the right to choose the conditions under which it would accept the jurisdiction of the Court, if at all.

69. Genocide, crimes against humanity and war crimes should be subject to automatic jurisdiction. However, if there was agreement in favour of opt-in jurisdiction, his Government would again reserve the right to select the conditions under which it would accept jurisdiction with regard to a particular crime. If treaty crimes were to be included in the Statute, they should be subject to opt-in jurisdiction.

70. His delegation was in favour of option 1 for article 7 (1).

71. His delegation was not in favour of *proprio motu* powers for the Prosecutor and considered that the article in question should be deleted. It was not sufficient to argue that the Statutes of the Criminal Tribunals for the Former Yugoslavia and Rwanda already provided for such *proprio motu* powers. On that analogy, the Statutes of those Tribunals were applied retroactively and the Statute might be so as well, but surely no delegation would accept that.

72. He considered that the Security Council should have the power to refer a situation to the Court, and not only in connection with aggression.

73. As far as deferral was concerned, option 1 for article 10 (2) was not appropriately formulated. A twelve-month period seemed too long. Moreover, his delegation did not favour renewal of the request by the Council.

74. **Ms. LI Yanduan** (China) said that her delegation had always maintained its reservations on an automatic jurisdiction provision, which would not encourage States to accede to the Statute.

75. Under customary international law, the three core crimes did not all have the same status. Whereas genocide was accepted by the whole international community as a crime, crimes against humanity and war crimes fell into a different category.

76. With regard to jurisdiction, she said that the effectiveness of the Court would depend entirely on the cooperation of States, and that the consent of the interested parties was therefore essential. Her delegation considered, with respect to article 7, that the Court might exercise its jurisdiction if the territorial State, the custodial State and the State of which the accused of the crime was a national were parties to the Statute.

77. With regard to option 3 for article 7, her delegation hoped that the provision provided for in the ILC draft could be kept intact.

78. As far as the powers of the Prosecutor were concerned, her delegation was unable to accept the current provisions of article 12.

79. With respect to article 6 (c), her delegation was in favour of option 2.

80. She considered that the Security Council should be empowered to refer cases to the Court. With respect to the Security Council's power of deferral, her delegation was in favour of option 2.

81. **Mr. ROWE** (Australia) said that his delegation was in favour of automatic jurisdiction and therefore did not support article 7 *bis*.

82. On the question of what States should be States parties or should have accepted the Court's jurisdiction before the Court could act in a particular case, his delegation was in favour of option 1 for article 7. Since that option entailed the acceptance of jurisdiction by non-parties, his delegation also supported article 7 *ter*.

83. He strongly supported *proprio motu* powers for the Prosecutor, subject to appropriate safeguards. He supported option 1 for article 12, which met that requirement, and also option 1 for article 6 (c).

84. With regard to the role of the Security Council, the Statute should strike a balance between the need for independent action by the Court, free from any political influence, and the need to recognize the Council's role in relation to the maintenance of international peace and security under Chapter VII of the Charter. That balance was adequately recognized in article 6, which provided for referral by the Council acting under Chapter VII. With regard to option 1 for article 10 (2) relating to deferral, he said that, to give the Security Council any greater power in relation to the operation of the Court would unacceptably compromise the Court's independence.

85. On the question of complementarity, his delegation considered that article 15 should be retained in its current form, since it represented a carefully crafted compromise.

86. **Mr. van BOVEN** (Netherlands) said that his delegation considered it essential that States that ratified the Statute should also accept the automatic jurisdiction of the Court with regard to the core crimes. It therefore did not agree with the opt-in/opt-out modalities or consent regimes as presented in article 7 *bis*.

87. With regard to the preconditions for the exercise of jurisdiction, his delegation considered that the core crimes would warrant universal jurisdiction. However, since that option was not mentioned in the discussion paper, his delegation would favour option 1 for article 7, which came closest to its views on the subject.

88. His delegation considered the *proprio motu* powers of the Prosecutor mentioned in article 6 (c) and elaborated in article 12 to be essential. Moreover, the elaboration in article 12 of the review function of the Pre-Trial Chamber was highly commendable.

89. He considered that the Security Council should be able to refer situations to the Court, as provided for in article 6 (b). He agreed with the Swiss representative that, in connection with article 10, the Council should not have a filter function. He did, however, recognize that in certain instances the Council might have a legitimate interest in the type of issues before the Court. The proposal in option 1 for article 10 (2) was therefore acceptable, although the wording needed clarification and it should be specified that the request by the Council to the Court should be made in a publicly-adopted resolution.

90. His delegation supported the proposed Belgian amendment that the rights of the Prosecutor to take the necessary measures to preserve evidence should not be affected when an investigation or prosecution was suspended.

91. **Mr. WENAWESER** (Liechtenstein) said that his delegation considered that every State that became a party to the Statute should thereby accept the Court's jurisdiction in respect of the crimes set out in article 5. Automatic jurisdiction was absolutely essential for the Court's effectiveness and independence, but should initially be limited to the core crimes. Article 7 *bis* was therefore unnecessary.

92. Since the option based on universal jurisdiction that had been favoured by many States no longer appeared in the discussion paper, his delegation considered that option 1 of article 7 on acceptance offered a good basis for compromise.

93. Regarding the Prosecutor's *proprio motu* powers, his delegation was in favour of option 1 for article 12, providing for the Prosecutor's power to initiate investigations on the basis of information from reliable sources. That power was a constituent of a truly independent Court and was of paramount importance.

94. With regard to the role of the Security Council on matters other than aggression, his delegation thought that the Council should have the power, under Chapter VII of the Charter, to refer a situation to the Prosecutor as provided for in article 6 (b).

95. As far as article 10 (2) was concerned, option 1 provided a sound basis for a compromise; his delegation supported the proposal to include wording on the securing of evidence in that provision. In any discussion on the role of the Council, the Court's independence should be the guiding principle.

96. He supported retention of the language in article 15, which reflected a very delicate and carefully drafted compromise.

97. **Mr. PAL** (India) said that he could endorse almost everything that the United States representative had said. Since the aim was to achieve almost universal acceptance of the Statute, automatic jurisdiction was not the way forward. The opt-in provision in article 7 *bis* was the only acceptable one.

98. As to what States had to be parties to the Statute or to have accepted its jurisdiction before the Court could proceed, his delegation considered it essential that both the territorial State and the custodial State should be States parties and should have accepted jurisdiction; he would therefore prefer option 3 for article 7.

99. His delegation could not accept a *proprio motu* power for the Prosecutor, because it considered that the Court could act only on referral from a State party. Therefore he could not agree to article 6 (c) or to article 12 as a whole.

100. It was on the role of the Security Council that his delegation disagreed with that of the United States, since it considered that the Statute could neither add to nor detract from the powers of the Council under the Charter. The Court's independence could not be preserved if it could act only after the Council had referred a matter to it. The Council's powers would in any case be preserved by the Charter and there should be no reference to the Security Council in the Statute.

101. He pointed out that an anomalous situation might arise, in violation of the law of treaties, when a non-party to the Statute, as a member of the Council, could influence a Council resolution affecting another non-party.

102. Complementarity must be the basis on which the Court should act. In his delegation's view, articles 15 and 16 were needed in the Statute. Both should be strengthened and his delegation would be pleased to embark upon that exercise in cooperation with others.

103. **Mr. MUSSAVOU MOUSSAVOU** (Gabon) said that the Court's jurisdiction for all crimes under article 5 should be automatic for States parties. The possibility of allowing States parties to take measures affecting non-parties might run counter to the law of treaties. His delegation therefore preferred option 4 for article 7, but would favour a combination of options 1, 2 and 4.

104. His delegation considered that the Prosecutor should be able to initiate proceedings *proprio motu*, but with judicial control by the Pre-Trial Chamber to obviate the possibility of abuse, and therefore preferred option 1 for article 12.

105. With regard to the role of the Security Council, his delegation agreed that the Council had the power to refer situations to the Court under the Charter. As to its role on issues other than aggression, his delegation had a preference for option 3 for article 10, though option 2 might provide an acceptable basis for compromise as long as measures were taken to protect witnesses and preserve evidence if there was any deferral. However, the Council should not have the power to defer consideration of a case by the Court for more than six months.

106. **Mr. MACKAY** (New Zealand) said that his delegation believed that automatic jurisdiction over all crimes was essential if the Court was to be effective. It did not support article 7 *bis*.

107. As to what States must be parties or accept jurisdiction, his delegation supported option 1 for article 7, which was already a compromise. The other options in that article were too limiting.

108. His delegation considered it essential for the Prosecutor to have *proprio motu* powers. However, in view of the concerns of others, his delegation was in favour of the safeguards provided in option 1 for article 12, which it hoped would go some way towards meeting those concerns.

109. With regard to the role of the Security Council, his delegation could accept option 1 regarding aggression for article 10.

110. It could accept option 1 on deferral and in that connection welcomed the statement made by the United States. However, the process must be transparent, and he agreed with other delegations that any decision for deferral should be by way of a formal resolution.

111. On the issue of complementarity, his delegation regarded article 15 in its current form as essential.

112. **Mr. GEVORGIAN** (Russian Federation) said that his delegation was in favour of automatic jurisdiction for genocide and State consent for crimes against humanity and war crimes. It could work on the basis of article 7 *bis*.

113. As to what States had to be parties to the Statute or to have accepted the Court's jurisdiction before the Court could act, his delegation considered that there had to be preliminary agreement by the State on whose territory the crime was committed and by the custodial State. However, he was sympathetic to the attitude of the delegations that favoured preliminary agreement by a State of nationality.

114. His delegation was opposed to the idea of giving the Prosecutor *proprio motu* powers. Before a case was referred to the Court, a State would have to make a complaint. That would make it possible to remove any political pressure from the Prosecutor. His delegation was therefore opposed to article 6 (c) and article 12 as a whole.

115. As to the role of the Security Council concerning aggression, his delegation favoured option 1 for article 10 (1). With regard to deferral, his delegation found it difficult to agree with any wording that might be interpreted as modifying the obligations of States under the Charter, in particular under Chapter VII. Moreover, the introduction of any time-limit might be interpreted as affecting the Security Council's powers under Chapter VII. His delegation was prepared to seek a generally acceptable option.

116. Replying to a point made by the representative of India, he recalled that the Security Council as a body was responsible for maintaining international peace and security and that the question whether a member was or was not a party to the Statute or to any other treaty was not of vital importance, since Article 103 of the Charter would prevail. There would thus be no violation of treaty law.

117. **Mr. AREVALO** (Chile) said that his delegation was in favour of inherent jurisdiction of the Court with regard to the core crimes. It could therefore accept article 7 *bis*.

118. As far as the States that had to accept jurisdiction before the Court could act were concerned, his delegation was in favour of option 1 for article 7. The provision in article 7 *ter* would also be useful for non-parties.

119. His delegation was in favour of *proprio motu* powers for the Prosecutor and therefore supported option 1 for article 6 (c), and considered that option 1 for article 12 also provided a good basis for agreement. It could not accept option 1 for article 11 (3).

120. As to the role of the Security Council on aggression (article 10 (1), option 1), his delegation would accept whatever was agreed on the crime of aggression. With regard to deferral, option 1 for article 10 (2) provided an interesting basis on which further work could be done. He endorsed the point made by the Netherlands and New Zealand on the need for a prior resolution from the Security Council. He also supported the Belgian point that evidence had to be preserved since it was vital for the future trial.

121. **Mr. RWELAMIRA** (South Africa), speaking on behalf of his own delegation and that of the other countries of the Southern African Development Community (SADC), said that they preferred inherent jurisdiction for all the core crimes under the Court's jurisdiction. However, being aware of the concerns expressed by some delegations on the need for additional requirements of consent, the SADC would be in favour of option 1 for article 7. Option 3 was quite unacceptable.

122. There should be no opt-in mechanism for any of the core crimes, but the SADC was flexible as to the possibility of an opt-in system for treaty crimes, in particular, drug crimes and attacks on United Nations personnel.

123. The role of the Security Council was probably related to the resolution of the problems of defining the crime of aggression. The SADC was flexible as to option 1 for article 10 but was certainly against option 2. It was in favour of *proprio motu* powers for the Prosecutor and supported option 1 for article 12. The SADC was flexible as to whether article 16 on admissibility should be contained in the Statute, but consideration might be given to including it if it were redrafted.

124. **Mr. HUARAKA** (Namibia) endorsed the remarks of the previous speaker on behalf of the countries of the SADC.

125. Namibia considered that the Court should have inherent jurisdiction, at least for the core crimes, once a State had ratified the Statute.

126. With regard to acceptance of jurisdiction, his delegation was in favour of option 1 for article 7.

127. His delegation considered that the Prosecutor should be able to initiate investigations ex officio on the basis of information from any reliable source.

128. With regard to the role of the Security Council, he agreed that the Conference could not amend the Charter. Article 10 might be revisited once an appropriate definition of aggression had been found.

129. Article 16 on preliminary rulings regarding admissibility had not really been debated, and he therefore suggested that a small working group should be set up to consider it.

130. **Mr. FALL** (Guinea) said that, with regard to the exercise of jurisdiction, his delegation was in favour of option 1 for article 6 (c).

131. As to acceptance of jurisdiction, his delegation regretted that the German proposal on universal jurisdiction seemed to have been withdrawn. Its second choice was option 1 for article 7. Article 7 *bis* should be deleted, to avoid weakening the jurisdiction of the Court.

132. His delegation supported the maintenance of article 7 *ter* on acceptance of the Court's jurisdiction by non-parties.

133. He was in favour of ex officio powers for the Prosecutor under the control of the Pre-Trial Chamber, and therefore supported option 1 for article 12.

134. With regard to the role of the Security Council, his delegation supported option 1 for article 10 (1) and was opposed to option 1 for article 11 (3).

135. **Mr. LEHMANN** (Denmark) said his delegation regarded it as essential that automatic jurisdiction should be provided for in the Statute, which should not be fragmented by including opt-in or opt-out clauses. Although his delegation was not in favour of preconditions for the exercise of jurisdiction by the Court, it could accept option 1 for article 7 as a starting point.

136. His delegation supported option 1 for article 12 on the role of the Prosecutor.

137. With regard to the role of the Security Council, his delegation would prefer option 3 for article 10. The Council should not be given the power to dictate that the Court suspend proceedings in a particular case. The Court might itself consider that suspending a case would serve the interests of justice, or the Court and the Security Council might cooperate on the basis of non-binding arrangements but not through a dictate.

138. **Mr. SCHEMBRI** (Malta) said that, under current international law, all States might exercise universal criminal jurisdiction over crimes of genocide, crimes against humanity and war crimes, regardless of the nationality of the offender, the nationality of the victim and the place where the crime was committed. However, in a spirit of compromise, his delegation was prepared to support the replacement of that concept in the Statute by the concept of automatic jurisdiction, but it could not contemplate any form of opt-in or State consent regime for any of the core crimes. For the Court to be effective and credible, State consent should be required only once, namely, when a State became a party to the Statute.

139. With regard to the Chairman's second question, his delegation supported option 1 for article 7 and was also in favour of article 7 *ter*.

140. Articles 6 and 12 referring to the independent role of the Prosecutor were, in his delegation's view, fundamental. The Court had to have an independent Prosecutor, within a system of appropriate checks and balances. A court relying exclusively on referral by the Security Council or a State party would not suffice to bring to justice those responsible for the crimes to be covered by the Statute. Option 1 for article 10 (2) would be a suitable compromise accommodating divergent views regarding the Security Council's role, but should be amended by adding that decisions under Chapter VII of the Charter should be taken only by public resolution.

141. Malta unreservedly supported the inclusion of article 15, since it believed that the principle of complementarity was essential.

142. *Mr. Mochochoko (Lesotho), Vice-Chairman, took the Chair.*

143. **Mr. IVAN** (Romania) said that in principle his delegation was in favour of universal jurisdiction but could accept automatic jurisdiction for genocide, war crimes, and crimes against humanity, and for aggression, if included.

144. With regard to the States that had to be parties to the Statute or to have accepted jurisdiction before the Court could exercise jurisdiction, his delegation supported option 1 for article 7, and article 7 *ter* regarding acceptance by non-parties.

145. His delegation was in favour of giving the Prosecutor ex officio power to initiate an investigation and supported article 6 (c). Option 1 for article 12, as well as the preliminary rulings regarding admissibility in article 16, would provide the necessary safeguards.

146. With regard to the role of the Security Council, his delegation accepted the Council's right to refer a situation to the Court and to request the deferral of proceedings, pursuant to Chapter VII of the Charter.

147. **Mr. MASUKU** (Swaziland) said that his delegation associated itself with the statement made by the representative of South Africa on behalf of the SADC countries.

148. Replying to the Chairman's questions, he said that his delegation considered that option 1 for article 6 (c) relating to the role of the Prosecutor should form part of the Statute.

149. His delegation was also in favour of the Court's having automatic jurisdiction in respect of the three core crimes, which could be supplemented by an opt-in mechanism for treaty crimes.

150. With regard to article 7 on acceptance of jurisdiction, his delegation considered that option 1 was acceptable.

151. Recognizing the role of the Security Council under the Charter, his delegation was in favour of option 1 for article 10 (1) and (2).

152. With regard to the role of the Prosecutor, his delegation considered that option 1 for article 12 was preferable, since it made provision for all necessary safeguards.

153. **Mr. OUMAR MAIGA** (Mali) said that ratification of the Statute by a State should signify automatic acceptance of the Court's jurisdiction for genocide, crimes against humanity and war crimes. His delegation had therefore supported the German proposal, which, unfortunately, did not figure in the discussion paper. His delegation was unable to accept article 7 *bis*.

154. The Prosecutor should have the power to initiate proceedings *proprio motu*; his delegation therefore supported option 1 for article 6 and option 2 for article 11.

155. He believed that it was necessary to specify the number of times that the Court might defer proceedings at the request of the Security Council. Moreover it was also important to ensure that evidence was preserved and victims protected during the deferral period.

156. His delegation supported the Syrian proposal to delete article 16.

157. **Mr. AL HUSSEIN** (Jordan) said that his delegation was in favour of automatic jurisdiction for all the core crimes under article 7, but did not accept the State consent regime suggested in the note to article 7 and in article 7 *bis*. Moreover, it considered that, if the State consent regime were adopted, contrary to the preference of many delegations, that might have fatal consequences for the Court that the Conference was trying to create.

158. With regard to the Chairman's second question, his delegation considered that one or more of the four States listed in option 1 for article 7 should be a party to the Statute before the Court could exercise its jurisdiction by way of the complementarity mechanism envisaged in article 15. His delegation supported article 7 *ter*.

159. His delegation strongly supported option 1 for article 12 referring to the *proprio motu* power of the Prosecutor to initiate proceedings and believed the safeguards contained therein were sufficient, in conjunction with those provided for in articles 47 and 48 of the draft Statute.

160. With regard to the role of the Security Council, his delegation was in favour of option 1 for article 10 (2).

161. He had two further comments on complementarity. It was essential to include article 15 as currently drafted to ensure that the Court would function effectively. He welcomed article 16 but considered that it required some redrafting in order to gain widespread acceptance.

162. **Mr. Seung-hoh CHOI** (Republic of Korea) said that his delegation strongly believed that the Court should have automatic jurisdiction over the core crimes. There was no need for an opt-in mechanism, and article 7 *bis* was therefore not acceptable to his delegation.

163. Regarding the acceptance of jurisdiction by non-parties, his delegation supported article 7 *ter* but thought that the text should be modified to cover obligations other than those under Part 9 of the Statute. His delegation was ready to cooperate in that work.

164. As to the preconditions for the exercise of jurisdiction, his delegation was of course in favour of option 1 for article 7 (1), which it had sponsored. That option was a compromise formulated to bridge gaps between the proponents of universal jurisdiction and those in favour of State consent in each particular case.

165. His delegation supported the *proprio motu* power for the Prosecutor to initiate proceedings, subject to appropriate safeguards, as provided in article 12.

166. He could accept either option 1 or 2 based on the Singaporean proposals with regard to the role of the Security Council, in recognition of the Council's primary responsibility for the maintenance of international peace and security.

167. In connection with referral by the Security Council, his delegation considered that the obligations imposed on States parties to supply relevant information needed to be revised.

168. His delegation firmly believed that the issue of complementarity should not be re-opened.

169. **Mr. SOARES da GAMA** (Guinea-Bissau) said that his delegation supported option 1 for article 6 concerning automatic jurisdiction with respect to genocide, crimes against humanity and war crimes. It would consider the inclusion of aggression once a satisfactory definition had been found.

170. His delegation was in favour of option 1 for article 7.

171. He considered that the Prosecutor should be able to act *proprio motu*, so that option 1 for article 12 was the most appropriate.

172. With regard to the role of the Security Council, his delegation could accept option 1 for article 10; with regard to deferral, option 2 might be used as a basis for compromise.

173. **Ms. KASYANJU** (United Republic of Tanzania) said that she endorsed the views expressed by the representative of South Africa on behalf of the SADC countries.

174. With regard to exercise of jurisdiction, her delegation strongly supported option 1 for article 6 (c), in conjunction with the safeguards provided in article 12.

175. Her delegation supported universal jurisdiction for all the core crimes but as a compromise could accept automatic jurisdiction. It considered that an "opt-in/opt-out" regime would undermine the Court's effectiveness and therefore supported option 1 for article 7. She would support articles 7 *bis*, 7 *ter* and 8.

176. With regard to the role of the Security Council, her delegation supported option 1 for article 10 (1). On article 10 (2) on deferral, its preference was for option 3 but it was willing to explore the matter further.

177. Her delegation supported option 2 for article 11 (3). With regard to article 12 on the Prosecutor, it was in favour of option 1. It continued to support the provisions of article 15 regarding complementarity.

178. In the light of its strong support for proposals regarding article 17, it saw no need for article 16.

179. **Ms. BETANCOURT** (Venezuela) said that, for the sake of consensus, Venezuela was prepared to agree that the Court should have automatic jurisdiction in respect of all the crimes under article 5. Article 7 *bis* was therefore unnecessary. She did not think that treaty crimes should be included in the Statute.

180. With regard to the acceptance of jurisdiction, her delegation could accept option 1 for article 7 and agreed to the inclusion of article 7 *ter*. The Prosecutor should be enabled to initiate proceedings ex officio, subject to the Pre-Trial Chamber mechanisms. It therefore accepted article 12, and would support option 2 for article 6 (c).

181. As to the role of the Security Council, she said that the Court should be an independent body with clearly defined relations with the Council. Her delegation could accept a reference in the Statute to the Council's role only if the crime of aggression were to be included within the Court's jurisdiction; she therefore supported option 1 for article 10 (1). Article 6 (b) should be worded accordingly. If the Conference decided to include a deferral clause in the Statute, it should stipulate that any decision by the Council should relate only to an act of aggression.

182. Her delegation considered that the principle of complementarity had to be reflected in the Statute and therefore supported article 15 as drafted in the discussion paper.

183. **Mr. KAUL** (Germany) said, with regard to acceptance of jurisdiction, that his delegation was dismayed that its proposal on universal jurisdiction had not been put forward as an option in the discussion paper. It still believed that the universal jurisdiction approach was legally sound. The Conference might be criticized for not making that the basis for the Court's jurisdiction.

184. With regard to the proposals for jurisdiction over the core crimes, his delegation considered that neither the State consent regime nor the opt-in proposal outlined in article 7 *bis* would be acceptable to participants, so far as all or any of the three core crimes were concerned. Automatic jurisdiction with regard to those crimes therefore had to be considered.

185. His delegation supported option 1 for article 7. The membership of one or more of the four States mentioned in that option would be sufficient to enable the Court to exercise its jurisdiction.

186. With regard to the *proprio motu* power of the Prosecutor to initiate proceedings, he stressed that option 1 for article 12 provided the important safeguard that the Prosecutor would be under the control of the Pre-Trial Chamber. However, unless the Prosecutor had the right to initiate investigations *proprio motu*, the Court's jurisdiction would be impaired. He therefore appealed to delegations to support option 1. Moreover, there were other safeguards, including the threshold clauses for the various crimes, and the provisions of article 16. Incidentally, his delegation could not accept the latter article in its current form since it constituted an attempt to establish additional procedural hurdles at the start of investigations. Furthermore, some of the points made by delegations in informal consultations had not yet been taken into account. His delegation would participate in any informal efforts to help improve article 16, perhaps combining it with article 17, which would provide yet another safeguard with regard to the Prosecutor.

187. As to the role of the Security Council, he said that article 10 was a very delicately balanced provision that safeguarded the independence of the Court and reconciled it with the Council's existing prerogatives. If aggression were included, paragraph 1 of that article would be necessary. His delegation supported option 1 for paragraph 2.

The meeting rose at 1 p.m.

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COMMITTEE OF THE WHOLE

SUMMARY RECORD OF THE 30th MEETING

Held at the Headquarters of the Food and Agriculture Organization of the United Nations on Thursday, 9 July 1998, at 3 p.m.

Chairman: Mr. IVAN (Romania)
later: Mr. P. KIRSCH (Canada)

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The meeting was called to order at 3.10 p.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (*continued*) (A/CONF.183/2/Add.1 and Corr.1; A/CONF.183/C.1/L.7, L.20, L.47/Add.1, L.51 and L.53; A/CONF.183/C.1/WGPM/L.2/Add.4)

Part 5 of the draft Statute (*continued*)

1. **Ms. FERNANDEZ de GURMENDI** (Argentina), Chairman of the Working Group on Procedural Matters, introduced the Group's report contained in document A/CONF.183/C.1/WGPM/L.2/Add.4, in which the Group submitted to the Committee of the Whole the following articles: article 57; article 57 *bis*, paragraph 1, paragraph 2 and subparagraphs (a), (b) and (c) of paragraph 3.

2. **The CHAIRMAN** asked whether he could take it that the Committee of the Whole agreed to refer the provisions contained in the report to the Drafting Committee.

3. *It was so decided.*

Part 11 of the draft Statute (*continued*)

4. **Mr. RAMA RAO** (India), Coordinator for Part 11, said that further informal consultations had been held on article 102, paragraph 5. Document A/CONF.183/C.1/L.47/Add.1, which was self-explanatory, contained a revised version of that paragraph, which he commended to the Committee of the Whole.

5. **The CHAIRMAN** asked whether he could take it that the Committee of the Whole agreed to refer the proposed text for article 102, paragraph 5, to the Drafting Committee.

6. *It was so decided.*

Part 2 of the draft Statute (*continued*)

7. **Mr. SALAND** (Sweden) said that he would respond to the questions posed by the Chairman at the previous meeting. His delegation had always favoured a unified regime for acceptance of the jurisdiction of the Court, and he supported article 7, paragraph 2, as it appeared in the discussion paper prepared by the Bureau (A/CONF.183/C.1/L.53). There should be automatic jurisdiction for core crimes, but an opt-in system would be appropriate for treaty crimes if they were included in the Statute. He was firmly opposed to any regime based on ad hoc State consent.

8. The question concerning the exercise of jurisdiction related to cases referred by a State party or investigation initiated by the Prosecutor. He favoured option 1 for article 7, paragraph 1, but supported the idea that the notion of "custody" should be replaced by the notion of being present in the territory of a State.

9. On the third question, he was in favour of a *proprio motu* role for the Prosecutor. Article 12 as currently drafted had the right balance between the power of the Prosecutor and the checks which judicial review by the Pre-Trial Chamber would give. He saw certain overlaps with article 16, and the relationship between the various articles

touching on admissibility must be considered. He welcomed, however, the very balanced way in which the material grounds for inadmissibility were stated in article 15.

10. On the fourth question, he was perfectly happy for the Security Council to refer situations to the Court in the exercise of its powers under Chapter VII of the United Nations Charter. On balance, he also supported the Security Council having the power to request deferral; there would be some merit in coordinating action by the Council and the Court. He was very much in favour of option 1 in paragraph 2 of article 10. However, the Council decision on deferral should be made by way of the adoption of a resolution.

11. **Mr. ONKELINX** (Belgium) supported option 1 for article 6, subparagraph (c), and option 1 for article 12. Regarding article 7, his delegation had always been in favour of automatic jurisdiction of the Court over States parties to the Statute. As a compromise, he accepted option 1 for paragraph 1. He was concerned that article 7 *bis* would give States parties the possibility to refuse consent, something he found alien to the concept of the functions of the Court.

12. In article 10, he was in favour of option 1 for paragraph 1, provided that agreement was reached on the definition of aggression. In paragraph 2, he was in agreement with the spirit of option 1 and could accept option 2. He recalled that his delegation had proposed an amendment (A/CONF.183/C.1/L.7) to ensure that evidence could be preserved during the period of suspension of proceedings in the Court. There were four essential principles involved. The first was the principle of suspension of the work of the Court; the second was the formal character of the relevant Security Council decision; the third was the limit on the duration of the suspension; and the fourth was the possibility of preserving evidence.

13. Article 15 on admissibility should be maintained in its entirety because it gave the best expression to the key concept of complementarity. He still had serious reservations about the proposed article 16.

14. **Mr. ROBINSON** (Jamaica), responding to the Chairman's first two questions, said that in addition to the core crimes the Court should also have jurisdiction over treaty crimes. Automatic jurisdiction would be reasonable for core crimes, but universal participation would in practice be enhanced by an opt-in or consent regime. He supported option 3 for article 7, paragraph 1, but proposed the addition at the end of (b) of the phrase "in accordance with international law". The Court should not have jurisdiction on the basis of an unlawful arrest. Jurisdiction in respect of treaty crimes should be based on the opt-in formula in article 7 *bis*. Article 7 *ter* should be reformulated, since it appeared to impose an obligation on States that were not parties to the Statute, which would be odd.

15. On the third question, he doubted very much whether the *proprio motu* power of the Prosecutor would yield the anticipated benefits—possibly quite the reverse—but he was prepared to join in any consensus on the issue.

16. On the fourth question, while recognizing the pre-eminent role of the Security Council in "Chapter VII" matters, he could not accept a relationship between the Council and the Court that would jeopardize the latter's independence. Option 1 for paragraph 1 and for paragraph 2 of article 10 would link the exercise of the Court's jurisdiction to decisions by the Council in a way which would jeopardize its independence. He was particularly concerned about option 1 for paragraph 2, which raised the possibility of repeated requests to the Court for deferral of an investigation or prosecution. The solution was for the Court to decide itself as to its jurisdiction, as provided for in article 17 of the draft Statute (A/CONF.183/2/Add.1). That would put the Court on the same footing as the International Court of Justice which had sometimes had to tackle difficult jurisdictional questions relating to Chapter VII of the Charter. He therefore favoured option 2 in paragraph 1 and option 3 in paragraph 2 of article 10. That did not affect the Security Council's power to refer matters to the Court, although he favoured the General Assembly

having similar powers. He had no difficulty with referral by the Security Council under Chapter VII, but doubted the justification for bypassing the regime of State consent in article 7, paragraph 1, in respect of such referrals. That regime should apply regardless of whether referral was by a State, the Security Council or the Prosecutor.

17. On the question of complementarity, he would accept article 15, but noted with regret that, particularly when read in conjunction with article 16, it would weaken the Court, since it would make proof that domestic remedies had been exhausted a precondition.

18. **Mr. DA COSTA LOBO** (Portugal) supported the principle of automatic jurisdiction.

19. Concerning the Chairman's second question, he would have preferred a system under which no consent was necessary either from States parties or non-parties, but he could, as a compromise, accept option 1 for article 7, paragraph 1.

20. On the third question, he was in favour of the Prosecutor having powers to initiate proceedings *proprio motu*, subject to control by a pre-trial chamber.

21. On the fourth question, he agreed that a matter could be referred to the Court by the Security Council. He could accept option 1 for article 10, paragraph 2, with certain clarifications. The decision of the Council must be a formal resolution. He also supported the addition of a provision such as that proposed by Belgium concerning the preservation of evidence.

22. **Mr. HAFNER** (Austria) considered that the Court must have automatic jurisdiction.

23. Regarding article 7, paragraph 1, he was in favour of option 1. To cover States not parties, article 7 *ter* would be very useful.

24. On the Chairman's third question, the Prosecutor must have power to initiate proceedings *proprio motu*. He could accept article 12, option 1, which took into account the concerns of States opposed to such powers. The acceptability of article 16 would depend not only on the final formulation but also on the outcome of the negotiations on other basic issues.

25. On the fourth question, he could accept option 1 in both paragraphs of article 10. He was, however, open to any drafting changes to paragraph 2 that would not further threaten the Court's independence. In that respect, he saw no need for the broad obligation proposed in article 11, paragraph 3.

26. On the question of complementarity, he hoped that no changes would be made to article 15, which was the fruit of long and hard labours.

27. **Mr. NDIR** (Senegal) said that the Court must have automatic jurisdiction for all the core crimes. With regard to States not parties, universal jurisdiction should be recognized in respect of genocide, crimes against humanity and war crimes. He could accept option 1 in article 7.

28. Concerning the role of the Prosecutor, he could accept option 1 for article 12 as a good basis for compromise. It was essential for the Prosecutor to be able to initiate proceedings ex officio, subject to control by the Pre-Trial Chamber.

29. On the Chairman's fourth question, the Security Council should be able to refer matters to the Court, but it would be preferable for it not to have the power to suspend proceedings. However, he would be prepared to accept option 2 for article 10, paragraph 2, if the period involved did not exceed three, or perhaps six months, and if the suspension was not renewable. Strong provisions should be included for the protection of witnesses and the preservation of evidence.

30. **Mr. BELLO** (Nigeria) wished to see an independent, credible and universally accepted court. He therefore favoured option 2 in article 6 and option 3 in article 7, and supported articles 7 *bis* and 7 *ter*. For article 12, he was in favour of option 2. The checks in the proposed article 12 were not sufficient to guarantee the credibility of the Court.

31. On article 10, he was comfortable with option 1 for paragraph 1. On paragraph 2, he supported option 3; there should be no room for the Security Council to dictate to the Court. In article 11, he preferred option 2, in the interests of the Court's independence. He accepted articles 15, 16 and 17.

32. **Ms. SHAHEN** (Libyan Arab Jamahiriya) favoured express, "opt-in" acceptance of the jurisdiction of the Court and the preconditions proposed in option 1 for article 7, paragraph 1.

33. The role of the Prosecutor should not be inhibited, but there must be built-in checks to limit his or her powers. She was in favour of option 1 for article 12, but had reservations on paragraph 1. She would have preferred the term "ex officio" rather than "*proprio motu*", and proposed the deletion of the last part of the paragraph, beginning with the words "organs of the United Nations ...".

34. She accepted the role of the Pre-Trial Chamber, and article 16.

35. She supported option 2 for paragraph 3 of article 11, to ensure an independent and impartial Court. The Security Council should not have powers over the Court or be able to suspend proceedings for twelve months. Both article 10 and article 6 (b) should be deleted.

36. **Mr. BIHAMIRIZA** (Burundi) supported option 1 for article 6 (c). He would have liked the Statute to confirm the principle of universal jurisdiction for core crimes, but could accept the proposal providing for automatic jurisdiction for genocide, crimes against humanity and war crimes. He was against article 7 *bis*.

37. The Security Council could refer cases to the Court under Chapter VII, but the independence of the Court must not be jeopardized, and he could not agree to option 1 of paragraph 2 of article 10.

38. On article 12, he firmly supported option 1, without which the Court would not be independent or effective.

39. **Ms. MOKITIMI** (Lesotho) said that, if an effective and independent court was to be established, there must be no requirement for State consent with regard to the core crimes, and the Court should have automatic jurisdiction. There should be no requirement that the custodial State, the territorial State or the State of nationality must accept the Court's jurisdiction.

40. She favoured option 1 for article 12. The Prosecutor should be able to initiate investigations *proprio motu* on the basis of information obtained from any source. Judicial review of the decision to commence an investigation would be the task of the Pre-Trial Chamber.

41. Regarding the Security Council, given its responsibilities under the Charter it would have a crucial role to play in referring matters to the Court under Chapter VII.

42. **Ms. TOMIČ** (Slovenia) said that the Court should have automatic jurisdiction in respect of the core crimes of genocide, war crimes and crimes against humanity, upon ratification of the Statute by the State concerned. There should be no subsequent opt-in or State consent regime for any of the core crimes, and she was against article 7 *bis*. She welcomed the provision contained in article 7 *ter* concerning States not parties.

43. Secondly, regarding preconditions for the Court to exercise jurisdiction, she strongly supported option 1 in article 7. She proposed the addition at the end of paragraph 1 (b) of the words "or the State on the territory of which the accused is present". The term "State that has custody of the suspect" could be construed too narrowly.

44. Thirdly, she strongly supported the power of the Prosecutor to act *proprio motu*, including option 1 for article 12, which contained sufficient judicial safeguards. She also supported option 1 for article 6 (c).

45. Regarding article 10, she supported option 1 in both paragraph 1 and paragraph 2. In the latter, she would favour the inclusion of additional wording regarding measures for the preservation of evidence. Article 11, paragraph 3, should be deleted.

46. **Mr. TOMKA** (Slovakia) said that Slovakia had supported automatic jurisdiction from the outset. However, a regime allowing a State to declare that it would not accept the Court's jurisdiction in respect of a particular crime was preferable to an opt-in regime.

47. Concerning preconditions for the exercise of jurisdiction, he fully supported option 1 in article 7. He could agree to giving the Prosecutor power to initiate investigations *proprio motu*, but did not think that that was a precondition for an effective court. Perhaps the issue could be left to be considered during a subsequent review of the Statute.

48. Finally, concerning the role of the Security Council on issues other than aggression, he supported the power of the Security Council referred to in article 6 (b) and also option 1 for article 10, paragraph 2, with the useful addition proposed by Belgium in document A/CONF.183/C.1/L.7.

49. **Mr. MANYANG D'AWOL** (Sudan) said that the inherent jurisdiction of the Court should cover genocide and certain other categories of crime. However, the idea of universal jurisdiction might give States that were not parties to the Statute an advantage over those that were, and lead States not to accede to the Statute. The States whose acceptance was needed as a precondition for the exercise of jurisdiction should be confined to the State on whose territory the act took place and the State which had custody of the person suspected of the crime.

50. The Security Council had a special role in matters relating to the question of aggression, but as far as other issues were concerned the General Assembly could perhaps be allowed to refer matters.

51. **Mr. NGUYEN BA SON** (Viet Nam) said that it was generally accepted that the Court's jurisdiction should be complementary to that of the States concerned. He could therefore accept article 7 *bis*. With regard to article 7, a combination of options 3 and 4 could provide a basis for consensus. The Court could then exercise its jurisdiction when the territorial State, the custodial State and the State of nationality of the accused were parties to the Statute.

52. To give the Prosecutor power to initiate proceedings *proprio motu* was unacceptable, for reasons already explained by his delegation. He therefore supported option 2 for article 6 (c) and option 2 for article 12.

53. His delegation strongly supported the inclusion of the crime of aggression among the core crimes under the jurisdiction of the Court and recognized the rights of the Security Council under Chapter VII of the United Nations Charter. He agreed that the United Nations General Assembly could also have a role.

54. **Ms. O'DONOGHUE** (Ireland) considered that, on becoming a party to the Statute, a State should accept automatic jurisdiction for all the core crimes.

55. As to the preconditions for the exercise of the Court's jurisdiction, she could accept option 1 for article 7, paragraph 1. She firmly supported the Prosecutor having the power to initiate proceedings *proprio motu*; that would be essential for the effectiveness of the Court. She could support option 1 for article 12, which contained adequate safeguards.

56. With regard to the role of the Security Council, the Council should have the power to refer situations to the Court. However, its power to defer or delay proceedings of the Court should be strictly limited to action under Chapter VII of the Charter, and relate to a limited period of time. She could support a solution along the lines of option 1 for paragraph 2 of article 10. She could also support the Belgian proposal for the preservation of evidence in the event of any such delay.

57. On the issue of complementarity, she supported the delicate balance struck in article 15.

58. **Mr. KROKHMAL** (Ukraine) supported automatic jurisdiction with respect to the most serious crimes, including the crime of aggression. The Court's jurisdiction must be effective for all crimes. There would naturally be a problem with automatic jurisdiction in respect of the so-called treaty crimes if they were included in the Statute, as he hoped they would be.

59. Secondly, on the question of which States would be required, as a precondition, to recognize the jurisdiction of the Court, there should be provision for acceptance by States not parties as under article 7 *ter* in the Bureau paper (A/CONF.183/C.1/L.53). That paper did not take sufficiently into account the German proposal based on the concept of universal jurisdiction. However, option 1 in article 7 would not be a bad basis for an agreement.

60. He supported the proposed power of the Prosecutor to act *proprio motu*, and supported option 1 for article 12, which adequately provided both for the independent role of the Prosecutor and for control by the Pre-Trial Chamber.

61. He did not think that there would be any conflict between the Security Council, acting under Chapter VII of the Charter, and the Court. He certainly supported the role of the Security Council in encouraging action by the Court. He had no serious objections to the provision concerning deferral at the request of the Security Council, and supported what had been said by the representatives of Switzerland, the Netherlands and Belgium on that subject.

62. The principle of complementarity should be reflected in the Statute. However, discussion of the issue should be focused on the text proposed for article 16. There should be no unjustified barriers to the exercise by the Court of its jurisdiction.

63. **Mr. KOFFI** (Côte d'Ivoire) said that in ratifying the Statute States should accept the jurisdiction of the Court in respect of the four categories of core crimes, including aggression. It was understood that the principles of

complementarity and *non bis in idem* applied. He therefore supported option 1 in article 6 and also articles 15 and 18. He did not support article 7 *bis*.

64. On the second question, concerning prior acceptance of jurisdiction, he agreed regarding acceptance of the jurisdiction of the Court by the State on whose territory the acts were committed and the custodial State. Without such acceptance, and without the cooperation of both those States, the Court's action might prove futile. He also supported article 7 *ter* on express acceptance by States not parties.

65. On the third question, he was in favour of the power of the Prosecutor to act *proprio motu* on the basis of information obtained from States, international organizations, non-governmental organizations or victims, or indeed from the Security Council. He therefore agreed with option 1 for article 12; the Pre-Trial Chamber would serve as an important control.

66. Concerning the role of the Security Council, he was in favour of option 1 for paragraph 1. He favoured option 1 for paragraph 2, although the wording could be improved to ensure transparency and impartiality.

67. **Ms. DASKALOPOULOU-LIVADA** (Greece) said that the jurisdiction of the Court should be automatic with respect to the crimes covered in the Statute, apart from the treaty crimes, if they were included. In article 7, she supported option 1.

68. Regarding the role of the Prosecutor, she strongly favoured option 1 for article 12, which would give the Prosecutor the power to initiate proceedings *proprio motu*. The Pre-Trial Chamber would provide the necessary safeguard. She also supported article 6 (c).

69. On deferral at the request of the Security Council, she could accept option 1 for article 10, paragraph 2.

70. Article 15 represented a delicate compromise and should remain as it stood. The inclusion of article 16 would not be useful.

71. **Mr. DEGUENON** (Benin) said that his delegation was in favour of the establishment of an independent, effective court, and therefore supported the idea that the Court should have automatic jurisdiction for States parties over all crimes covered in article 5 of the Statute. He was not in favour of article 7 *bis*, but accepted article 7 *ter* with regard to States not parties.

72. He supported the provisions allowing the Prosecutor to act *proprio motu* in article 12, and he firmly supported option 1 for article 6 (c).

73. Regarding the Security Council, he was in favour of option 1 of article 10, paragraph 1, but thought that the reference in the first sentence should be to the "State of which the accused is a national". For paragraph 2, he was in favour of option 2; the revised version of the provision should reduce the period of deferral and allow renewal once only. Appropriate measures should be taken to preserve evidence and to protect witnesses. The General Assembly should also be able to refer cases to the Court.

74. *Mr. P. Kirsch took the Chair.*

75. **Mr. KERMA** (Algeria) was not in favour of automatic jurisdiction of the Court over all the crimes covered by the Statute. When ratifying the Statute, States should indicate for which crimes they accepted the Court's

jurisdiction. For the exercise of jurisdiction, the consent of the following States would be necessary: the State of which the victim was a national, the State where the act had been committed and the State of which the accused was a national. With regard to States not parties, he supported article 7 *ter*.

76. He did not support the power of the Prosecutor to initiate investigations *proprio motu*. Such powers might expose him or her to all sorts of pressures and prevent him or her from carrying out his or her work impartially and independently.

77. While he recognized the importance of the Security Council in maintaining international peace and security under the United Nations Charter, its intervention should be confined to referral of cases to the Court. Parallel to that, the General Assembly should also have the right to refer cases to the Court.

78. **Mr. EFFENDI** (Indonesia) said that he favoured option 2 for article 6 (c) and option 2 for article 12. He supported articles 7 *bis* and 7 *ter*, as well as option 4 in article 7, modified to take account of the deletion of article 6 (c). The Security Council should have a role in relation to the issue of aggression. He favoured the inclusion of articles 15 and 16, which might even be strengthened.

79. **Mr. AZOH-MBI** (Cameroon) said that he would have much preferred universal jurisdiction with respect to all the core crimes, but would settle for automatic jurisdiction. The opt-in regime would run counter to the fundamental concept of the Statute. With respect to the preconditions for the exercise of jurisdiction in article 7, he preferred option 1.

80. An efficient and impartial court required a strong prosecutor, and article 12 (option 1) was satisfactory in that respect, since it contained adequate safeguards. He also favoured option 1 for article 6 (c). On admissibility, he favoured option 1 for article 16.

81. Finally, the relationship between the Security Council and the Court should be a matter of cooperation and complementarity. The Council needed the Court to help maintain global peace and the Court needed the Council, in particular, to help enforce its decisions. He therefore favoured option 1 for article 10, paragraph 1.

82. **Mr. ASSHAIBANI** (Yemen) did not support the automatic jurisdiction of the Court. Neither could he support the power of the Prosecutor to initiate investigations *proprio motu*. He strongly supported the inclusion of the crime of aggression as one of the core crimes within the jurisdiction of the Court. The role of the Security Council, under Chapter VII of the Charter, was a complementary one in that respect. The Council should assist the Court by referring matters, but not interfere in its work. He supported a similar role for the General Assembly.

83. **Mr. VERGNE SABOIA** (Brazil) accepted automatic jurisdiction in respect of the crime of genocide. With regard to the other categories of core crimes, there might be a case for some form of opt-in, in the form of a declaration by a State, subsequent to its ratification of the Statute, that it would also accept automatic jurisdiction with respect to one or both of the other categories of core crimes. Brazil would be flexible with regard to automatic jurisdiction over the other core crimes if the provisions on complementarity provided adequate safeguards.

84. For article 7, he preferred option 1. However, to require the consent of the State of nationality of the accused might excessively restrict the jurisdiction of the Court.

85. He strongly supported the power of the Prosecutor to initiate proceedings *proprio motu*, subject to appropriate safeguards. He therefore supported the present draft of article 12. Such a power would fill a potential void if, because

of political or strategic considerations, both the Security Council and States parties felt unable to refer a situation involving the crimes covered by the Statute.

86. He favoured option 1 for article 10, paragraph 1, for article 10, paragraph 2, and for article 6 (c).

87. **Ms. MEKHEMAR** (Egypt) supported automatic jurisdiction over the core crimes, which should include aggression. States not parties to the Statute should not be subject to the Court by virtue of universal jurisdiction, because that would run counter to international law. She supported the idea behind article 7 *bis*, but core crimes and treaty crimes should be dealt with differently. She supported article 7 *ter* and article 8.

88. The Security Council should have the right to refer cases to the Court, but she had strong reservations about any further involvement. Any power to request deferral, if accorded, should be limited to a maximum of twelve months, and requests should not be renewable.

89. With regard to the Prosecutor, article 12 was generally acceptable but should be amended to limit sources of information to official sources.

90. She still had reservations concerning article 15. The Court should not be judge in its own cause. She supported article 16 in principle.

91. **Mr. NYASULU** (Malawi) appealed to delegations to make an effort to achieve compromises. It was unhelpful for powerful countries to attempt to force their point of view on the rest by threatening not to sign the Statute.

92. **Mr. NATHAN** (Israel) said that, as it was not yet clear which crimes were going to be included in the Statute, and some had not so far been adequately defined, he would at that stage opt for the solution proposed in article 7 *bis*. On question 2, the Court should not have universal jurisdiction. The universal nature of a crime did not give a particular body universal jurisdiction. The Statute would confer jurisdiction on the Court by the sovereign consent of States parties. A precondition to the exercise of the Court's jurisdiction should be the adherence to the Statute of specific categories of States. Those States should be the territorial State, the custodial State, and the State of nationality of the accused.

93. The Prosecutor should not have the power to initiate investigations *proprio motu*, since that might weaken rather than reinforce his or her independence by exposing him or her to political pressure and manipulation.

94. Regarding the Security Council, it was essential to include the crime of aggression within the Court's jurisdiction, and he supported option 1 for paragraph 1 of article 10. He favoured option 1 for paragraph 2, which would strike a balance between the proper exercise of the Security Council's functions under the Charter and the functions of the Court. He had no difficulty with the Security Council referring situations to the Court.

95. **Ms. LEHTO** (Finland) considered that the Court should have automatic jurisdiction over all the core crimes. She therefore favoured paragraph 2 of article 7 and the deletion of article 7 *bis*.

96. Concerning the second question, an elaborate regime of complementarity had been evolved in articles 15 and 17, to which article 16 might be added. That had considerably raised the threshold for the exercise of the Court's jurisdiction, with the explicit purpose and effect of highlighting the primacy of national jurisdictions. Conversely, there was a trend towards less onerous and more automatic procedures as far as acceptance and exercise of jurisdiction were concerned. She would caution against trying to reverse that second trend, as that might prevent the

Court from effectively carrying out its tasks. Although none of the options for paragraph 1 of article 7 were without danger in that respect, option 1 seemed to enjoy wide support as a basis for compromise.

97. The Prosecutor should be able to initiate investigations *proprio motu*, subject to appropriate safeguards in the form of judicial control. Article 12 met that need quite adequately.

98. Concerning the Security Council, she would have preferred the "zero option" for paragraph 2 of article 10, but in a spirit of compromise she was prepared to work on the basis of option 1. However, the form of the Security Council decision was important, and the question of preservation of evidence would have to be addressed, along the lines proposed by Belgium.

99. **Mr. GÜNEY** (Turkey) said that the Court should only have jurisdiction where there had been express acceptance and consent through a declaration or through the so-called "opt-in/opt-out" mechanism. With regard to inherent and automatic jurisdiction, such an approach was unrealistic because it did not reflect present realities. For that reason, article 7 *bis* could be a good basis for compromise. Article 7 *ter* should also be retained.

100. The Court's effectiveness depended on the cooperation of States. The State on whose territory the act or omission had taken place, the State with custody of the person who had committed the crime and the State of which the accused was a national must be parties to the Statute or accept the jurisdiction of the Court for the crime in question.

101. To grant the Prosecutor powers to investigate ex officio would be damaging to the principle of complementarity, and he or she would be overwhelmed with complaints of a political nature. He therefore favoured option 2 for article 6 (b) and for article 12.

102. Commenting on article 8, he said that the wording in document A/CONF.183/C.1/L.53 needed some amendment. The agreement to combine articles 8 and 22 in the original draft (A/CONF.183/2/Add.1) had been based on the assumption that the first sentence of the original article 8 ("The Court has jurisdiction only in respect of crimes committed after the date of entry into force of this Statute") would be included.

103. The Security Council had a role under Chapter VII of the Charter, and he was in favour of option 1 for article 10, paragraph 1. He could accept option 1 for paragraph 2 as a compromise.

104. He fully supported article 16 in its present wording.

105. **Mr. TALICE** (Uruguay) said that the exercise of jurisdiction should be within the exclusive domain of the States parties and the Security Council acting under Chapter VII of the United Nations Charter. He therefore did not agree with ex officio powers for the Prosecutor under articles 6 and 12. That did not affect the independence of the Prosecutor, but a complaint by a State or the Security Council would give the Prosecutor the legitimacy that he or she would need to act effectively. His delegation's proposal for article 13 in document A/CONF.183/C.1/L.51, under which States would be given the right to be heard prior to a decision by the Pre-Trial Chamber, offered a possible compromise.

106. Jurisdiction should be based on complementarity and cooperation. How, he wondered, could the Court exercise jurisdiction if the State on whose territory the act had been committed as well as the State of nationality of the accused were not parties to the Statute? He therefore preferred options 2 and 4 in article 7.

107. On acceptance of jurisdiction, the most realistic solution would be to combine the options in articles 7 and 7 *bis* of the document, with automatic jurisdiction for genocide and an opt-in regime for other crimes within the competence of the Court. He agreed with article 7 *ter*. He also fully agreed with the principle of non-retroactivity of the Court's jurisdiction under article 8.

108. The Security Council acted under specific provisions of the Charter to maintain international peace and security. The idea in paragraph 2 of article 10 was that the Council, on the basis of Chapter VII of the Charter, could request the suspension of the proceedings of the Court where it believed that such proceedings might affect its own task of maintaining peace in the world. Such a request would require consensus among the five permanent Members, so that no single Member could use its veto to block the functioning of the Court. He therefore preferred option 1 for paragraph 2 of article 10.

109. He had difficulties with regard to article 15. A harmonious relationship between national systems and the Court would presuppose the existence of clearly established boundaries. He suggested the addition of a new subparagraph in paragraph 1 of article 15 making a case inadmissible if the act in question was based on a decision by a lawfully constituted legislative body under a democratic system. It would of course be up to the Court, not the State concerned, to determine whether it had jurisdiction.

110. **Mr. HERSI** (Djibouti) was in favour of automatic jurisdiction for all crimes under article 5 of the draft Statute, without distinction. Secondly, although he would have preferred the German concept of universal jurisdiction, he would accept option 1, for the reasons put forward by many delegations.

111. He was in favour of an independent prosecutor able to act on his or her own initiative, under the judicial control of the Pre-Trial Chamber.

112. He agreed that the Security Council should play a role in accordance with the provisions of the United Nations Charter in referring situations to the Court

113. **Mr. YAÑEZ-BARNUEVO** (Spain) said that it was absolutely essential that ratification of the Statute should mean the acceptance of the Court's automatic jurisdiction. Article 7 *bis*, providing for an opt-in regime, was not acceptable. On the other hand, article 7 was useful, as it allowed for acceptance of the jurisdiction of the Court by States not parties for given cases. Careful drafting was needed, however, to exclude possible abuse by non-parties. It should also be made clear that such acceptance bound the State to cooperate fully with the Court.

114. In response to the second question, the only proposal he could accept for article 7, paragraph 1, was option 1, based originally on a proposal by the Republic of Korea. The others would curtail the practical scope of the Court's jurisdiction.

115. On the powers of the Prosecutor, he supported option 1 for article 12, which provided the necessary guarantees. To meet the concerns of other delegations, article 6 might perhaps be widened to allow the General Assembly, for example, to refer situations to the Court, but the Prosecutor must be able to act independently in conducting investigations in situations so referred.

116. It was very important to ensure a proper balance in the relationship between the Court and the Security Council, such that the independence of the Court was not impaired while at the same time it could obtain the necessary backing from the Council. With regard to article 10, if the crime of aggression was included in the list of crimes the provision in paragraph 1 must be included.

117. Deferral was a separate matter, and should be dealt with in a separate article. His delegation had submitted a proposal on that point in document A/CONF.183/C.1/L.20. Of the options in the Bureau paper for article 10, paragraph 2, he preferred option 2. The main point was that the Security Council should interfere as little as possible with the work of the Court.

118. In article 11, paragraph 3 was unnecessary. He accepted the proposed article 15 as a working basis, but it needed certain improvements. He still had reservations about article 16.

119. **Mr. POLITI** (Italy) reiterated his support for the automatic jurisdiction of the Court over the core crimes, based on the ratification of the Statute by the States concerned. Paragraph 2 of article 7 should be retained and article 7 *bis* deleted.

120. Secondly, on acceptance of the jurisdiction of the Court, he favoured option 1 of article 7, paragraph 1, with its four alternative jurisdictional links. He also supported article 7 *ter*.

121. Thirdly, the Prosecutor should have the power to initiate investigations ex officio on the basis of information obtained from any source. That was essential if the Court was to operate effectively in the interests of the entire international community. He was therefore in favour of option 1 for article 12, which also provided adequate judicial safeguards against any improper use of that power, and option 1 for article 6 (c).

122. Fourthly, his delegation's position was that, on issues other than aggression, the Security Council should not have the power to block the judicial activity of the Court. Option 1 in paragraph 2 of article 10 offered a possible compromise to which he could agree in substance, but the request to defer should be made by formal resolution of the Security Council, its effects should be limited in time, and the Prosecutor must retain the right to take the necessary measures to preserve evidence during the period of suspension.

123. On admissibility, article 15 represented a delicate balance achieved as the result of some very intensive negotiations, and should be retained as it stood. He still had doubts about the need for article 16, but was ready to work on the text to reach a possible compromise.

124. **Ms. PIBALCHON** (Thailand) supported the notion that the Court should have automatic jurisdiction over all core crimes, once a State became a party to the Statute, without any need for further declaration. She supported article 7, paragraph 2, for all the core crimes, article 7 *bis* with respect to treaty-based crimes and article 7 *ter*.

125. On the Chairman's second question, option 1 for article 7, paragraph 1, would give the Court more opportunity to prosecute the accused than other options. If that option did not secure general agreement, she could agree that the precondition should be acceptance by the territorial State or the custodial State.

126. The role of the Security Council should be recognized in the Statute with regard to the crime of aggression, if it was eventually included. Pending a decision on that issue, she preferred option 1 for both paragraph 1 and paragraph 2 of article 10, with the proviso that the decision to request deferral must take the form of a resolution of the Security Council. Under article 6 (b), the Security Council, acting under Chapter VII of the United Nations Charter, should refer only situations where a crime of aggression had been committed.

127. Lastly, for article 11, paragraph 3, she supported option 1, to avoid any overlap between the work of the Court and that of the Security Council.

128. **Mr. Sayyid Said Hilal AL-BUSAIDY** (Oman) preferred opting in by means of a declaration to automatic jurisdiction. In article 7, he preferred option 1, and he supported the inclusion of articles 7 *bis* and 7 *ter*. Concerning the role of the Security Council, his delegation had already indicated support, with certain provisos, for the inclusion of the crime of aggression in the list of crimes under the jurisdiction of the Court. However, any interference by the Council, a political body, in the administration of justice by the Court should be precluded. A request by the Security Council to the Court to suspend its proceedings should be subject to a non-renewable time limit.

129. The Prosecutor should not have the right to open investigations *proprio motu*, because he or she might be swamped by requests and exposed to political pressures which would jeopardize his or her impartiality. The Prosecutor might be given some degree of latitude in the case of a complaint by a State, subject to a decision of the Pre-Trial Chamber on the basis of evidence presented to it.

130. **Mr. FIFE** (Norway) said that the Court's effectiveness and credibility, in his delegation's view, required it to have automatic jurisdiction over the core crimes: genocide, crimes against humanity and serious war crimes. As a compromise, his delegation was willing to consider option 1 in article 7. He did not find article 7 *bis* useful, but fully supported article 7 *ter*.

131. On the power of the Prosecutor to initiate proceedings *proprio motu*, a number of provisions in the draft Statute offered protection against prosecutorial bias, including provision for control by a pre-trial chamber over investigations. He therefore favoured option 1 for article 12.

132. With regard to the role of the Security Council, he favoured option 1 of article 10, paragraph 2. It struck a fine balance between the independence of the Court and the role of the Council under Chapter VII of the United Nations Charter. The Belgian proposal on preservation of evidence (A/CONF.183/C.1/L.7) was very useful.

133. The current draft for article 15 represented an important compromise and should be retained.

The meeting rose at 6 p.m.

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COMMITTEE OF THE WHOLE

SUMMARY RECORD OF THE 31st MEETING

Held at the Headquarters of the Food and Agriculture Organization of the United Nations on Thursday, 9 July 1998, at 6 p.m.

Chairman: Mr. IVAN (Romania) (Vice-Chairman)

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The meeting was called to order at 6 p.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (*continued*) (A/CONF.183/2/Add.1 and Corr.1; A/CONF.183/C.1/L.53)

Part 2 of the draft Statute (*continued*)

Discussion paper prepared by the Bureau (*continued*)

Articles 6-20 (*continued*)

1. **Mr. KAM** (Burkina Faso) said that his delegation wished to see an independent and effective Court, strong enough to prosecute all crimes within its jurisdiction. With respect to the jurisdiction of the Court, therefore, it was in favour of option 2 in article 7, conferring automatic jurisdiction over the core crimes enumerated in article 5 under (a), (b), (c) and (d). It also supported article 7 *ter* on acceptance by non-States parties. Article 7 *bis* should be deleted.

2. The Prosecutor must have the independence enabling him or her to initiate procedures which might be blocked by a State or the Security Council. His or her powers should however be subject to control by the Pre-Trial Chamber. Burkina Faso therefore favoured option 1 in article 12. The Security Council should have the power to refer situations other than the crime of aggression to the Court. However, it should not be able to act as a censor of the Court. Any deferral should be for the shortest feasible period of time and should not be renewable.

3. **Mr. TAFA** (Botswana) endorsed the statements made by South Africa on behalf of the Southern African Development Community (SADC) States and by Malawi. He rejected the "opt-in/opt-out" approach: in his delegation's view, States ratifying the Statute must accept the Court's automatic jurisdiction in respect of all the core crimes. That did not mean he did not want to see a universally accepted court. However, the ideal of universality should not be achieved at the expense of effectiveness.

4. On the second issue, Botswana preferred option 1 in article 7. It also favoured an independent Prosecutor able to initiate investigations *proprio motu*, subject to control by the Pre-Trial Chamber. Nor was it opposed to the Security Council having the right to refer to the Prosecutor situations in which crimes other than aggression appeared to have been committed.

5. **Mr. AGBETOMEY** (Togo) said that the Court should be able to exercise its jurisdiction over all core crimes in accordance with article 6 (a), (b) and (c). Consequently, his delegation also supported article 12, option 1, as it was convinced that the Prosecutor needed ex officio powers. It preferred option 1 in article 7 on acceptance of jurisdiction, and supported article 7 *ter*. Article 7 *bis* should be deleted. On the role of the Security Council, option 1 for article 10, paragraph 1, would be very important if the crime of aggression were included in the list of crimes, as would option 1 for paragraph 2.

6. **Mr. DOUDECH** (Tunisia) said his delegation felt that option 2 on exercise of jurisdiction was the one most likely to ensure the effectiveness of the Court. As for acceptance of jurisdiction, Tunisia favoured a combination of automatic jurisdiction for certain crimes and explicit acceptance for others. Discussions should continue with a view to reaching a consensus on the role of the Prosecutor. The Court should not be prevented by the Security

Council from exercising jurisdiction over situations involving the crime of aggression. Nevertheless, due weight must be accorded to the latter body's role in the maintenance of international peace and security.

7. **Mr. MIKULKA** (Czech Republic) said that, as the trend of the debate had been to limit the number of crimes within the jurisdiction of the Court, that jurisdiction should be automatic. His delegation saw no justification for an "opt-in" regime, and thus supported article 7, paragraph 2. It was opposed to article 7 *bis*. An "opt-in" declaration should be open only to States not parties to the Statute, as envisaged in article 7 *ter*.

8. On the question of preconditions to the exercise of jurisdiction, it would be sufficient if a single State among those listed in paragraph 1 of article 7, option 1, accepted the jurisdiction of the Court. The Czech delegation was firmly opposed to the idea that the consent of the State of nationality of the accused should be a sine qua non for the exercise of jurisdiction. It was flexible on the role of the Prosecutor. Finally, the Statute must absolutely respect the functions of the Security Council, and his delegation thus supported article 6 (b) and option 1 in paragraphs 1 and 2 of article 10. However, it saw no justification for paragraph 3 of article 11, which should be deleted.

9. **Mr. MORSHED** (Bangladesh) said his delegation was in favour of automatic jurisdiction in respect of the core crimes, but that, as a compromise, it could consider a combination of automatic jurisdiction and an "opt-out" regime in respect of particular crimes. On preconditions, he strongly supported the compromise proposed by the Republic of Korea. Acceptance of jurisdiction by the territorial State was indispensable. To endow the Prosecutor with the power to initiate proceedings *proprio motu* would be to invest a single individual with some of the attributes of a State. The checks and balances in the proposal by Germany and Argentina would have to be significantly expanded to obviate the pressures to which a Prosecutor endowed with such powers would be exposed. The regime of the Charter under Chapter VII must at all costs be preserved, but the language of option 1 in article 10, paragraph 1, was perhaps unduly wide-ranging. The Security Council must also have the power to refer situations to the Court. On deferral, Bangladesh supported the carefully constructed Singapore compromise together with the Belgian proposal concerning the preservation and protection of evidence.

10. **Mr. DE SARAM** (Sri Lanka) said that, given the clarity of general international treaty law and customary law with respect to the crime of genocide, it was reasonable to expect that a State becoming a party to the Statute should thereby accept the Court's jurisdiction with respect to that crime. The same clarity did not obtain with respect to war crimes and crimes against humanity. He therefore agreed with the proposal by the International Law Commission that acceptance of jurisdiction over those crimes should be in accordance with the so-called "opt-in" procedure.

11. On acceptance of jurisdiction, Sri Lanka supported option 4 in article 7, although it also favoured the additional requirement of the consent of the State in which the suspect was present. As to article 10, once a matter was before the Court, the international criminal law process must be allowed to proceed without interference from extraneous entities. Sri Lanka therefore strongly favoured option 3 in article 10, paragraph 2. It could not agree to the power of the Prosecutor to act *proprio motu*, in article 12, since the position of a prosecutor in international jurisdictions differed from his or her position in national jurisdictions. It fully supported articles 15 and 16. Once the crimes to come before the Court had been determined, the question of complementarity was a necessary but not an essential component.

12. **Ms. WYROZUMSKA** (Poland), speaking also on behalf of Lithuania, said her delegation believed strongly that the Court should have automatic jurisdiction over core crimes, as an essential precaution for its effectiveness and credibility. On the exercise of the jurisdiction, given the nature of the crimes concerned, option 1 in article 7, paragraph 1, offered an acceptable solution. The Prosecutor must have the power to initiate proceedings *proprio motu*, subject to suitable safeguards. Option 1 in article 12 was therefore preferable, and the Polish and Lithuanian

delegations consequently also supported the inclusion of article 6, paragraph (c). While the Security Council should have some role, there should be a proper balance between the competence of the Council and the independence of the Court. That balance was reflected in option 1 for article 10, paragraph 1.

13. **Ms. PERALBA GARCIA** (Andorra) said her delegation was in favour of automatic jurisdiction of the Court over the core crimes. The Prosecutor should be able to initiate an investigation *proprio motu*; Andorra therefore favoured the retention of article 6, paragraph (c), and of article 12. A balance between the Security Council's powers and those of the Court was essential. Her delegation thus supported article 6, paragraph (b), and the retention of article 10, paragraph 1.

14. **Mr. LARREA DAVILA** (Ecuador) said his delegation favoured the inclusion of article 6, paragraph (c), which gave the Prosecutor the power to initiate the investigation of a crime under the jurisdiction of the Court in accordance with article 12. On article 7, Ecuador was still of the view that the Court should have universal jurisdiction over the crimes included in the Statute. It could, however, support option 1 as a basis for compromise. On article 11, it supported option 2 on the understanding that the Court would be an independent organ created through an international treaty. As to article 12, his delegation believed that the Prosecutor must be strong and independent and have the power to initiate investigations *proprio motu*. It could, however, support the compromise solution in option 1 for the sake of consensus. Article 15, on admissibility, was fundamental, and should be retained in its present wording so as to safeguard the principle of complementarity.

15. **Mr. AL-SA'AIDI** (Kuwait) said his delegation preferred option 1 in article 7, paragraph 1. It favoured automatic jurisdiction for the most serious crimes, and a consent regime for the others. With respect to article 10, he affirmed the need to guarantee the independence of the Court. Nevertheless, the role of the Security Council with respect to the crime of aggression under Chapter VII of the Charter needed to be clearly spelled out. On article 12, the Prosecutor should be able to exercise his or her powers ex officio, subject to appropriate control by the Pre-Trial Chamber. In article 20, paragraph 1 (b), the term "general international law" should be amended to read "public international law".

16. **Mr. NGATSE** (Congo) said that the Statute should provide for automatic jurisdiction of the Court over genocide, war crimes, crimes against humanity and the crime of aggression. His delegation was in favour of universal jurisdiction, and thus regretted the omission of the proposal by Germany from the discussion paper. It would reluctantly accept option 1 on article 7, paragraph 1, as a compromise. However, it was opposed to the jurisdiction of the Court being subjected to a regime of acceptance by States, which should not be allowed the possibility of protecting those responsible for the most odious crimes. Article 7 of the document should be deleted, as it proposed a regime that could considerably weaken the powers of the Court.

17. The Prosecutor should have ex officio powers to initiate proceedings, and should not be subject to controls by the Pre-Trial Chamber, which should only intervene once proceedings had commenced, to check abuses. The prerogatives of the Security Council with regard to acts of aggression must be respected, provided they did not encroach on the jurisdiction of the Court. The Security Council should have the power to refer matters other than aggression to the Court. Although the Congo was opposed to conferring on the Council powers to suspend the Court's proceedings, it could, as a compromise, agree to a suspension for a maximum, non-renewable period of six months. Provision should be made to protect evidence and testimony. Article 10 was acceptable on that condition. The Congo was also in favour of option 2 in article 11. It endorsed the wording of article 15 and was in favour of the deletion of article 16.

18. **Mr. MAHMOOD** (Pakistan) said his delegation could accept option 3 in article 7, with the exclusion of any role for the Prosecutor. It also favoured article 7 *bis* on opt-in, and article 7 *ter*. On article 6, only States parties should be able to refer situations to the Prosecutor. Paragraph (c), and also paragraph (b), should therefore be deleted. Concerning article 10, the Security Council should not have a role, for the reasons given by India. The Prosecutor should not have the power to initiate proceedings *proprio motu*, so article 12 should be deleted. Article 15 was essential to the Statute, but needed to be strengthened.

19. Paragraph 1 of article 16 was acceptable. However, paragraphs 2 and 3 posed some problems, as Pakistan was not in favour of the Prosecutor determining that a State was unwilling or unable genuinely to carry out investigations. However, the Prosecutor should be able to undertake investigations after a State party had referred a matter to him or her and if there had been a fundamental change in the circumstances, resulting in a total breakdown of State authority.

20. **Mr. ABDALLA AHMED** (Iraq) said that only States parties should be able to trigger investigations and that paragraphs (b) and (c) of article 6 must therefore be deleted. Conferral of automatic jurisdiction with respect to the crimes included in the Statute could run counter to the principle of complementarity. Iraq therefore preferred an "opt-in" regime under article 7.

21. With respect to article 10, on the role of the Security Council, in the light of the overriding need to ensure the independence of the Court, Iraq could not support any of the options. Referral of a situation by the Security Council under the Chapter VII procedure would inevitably have an impact on the decision of the Court. Article 11, paragraph 3, should also be deleted, and the title of that article amended to read "Referral of a situation by a State Party".

22. On article 12, Iraq was opposed to the initiation of an investigation by the Prosecutor *proprio motu*. Article 15 on admissibility should be drafted in such a way as to ensure complementarity between the jurisdiction of the Court and national jurisdictions. Article 16 was acceptable, subject to his comments on article 6. In article 18, on the principle of *ne bis in idem*, Iraq supported paragraphs 1 and 2, but paragraph 3, which contravened the principle of complementarity, should be deleted.

23. **Ms. SIMONE** (Armenia) said her delegation supported automatic jurisdiction over genocide and State consent for jurisdiction over crimes against humanity and war crimes. However, it would not stand in the way of consensus on that issue. Regarding which States should be parties to the Statute before the Court exercised jurisdiction, it supported option 1 in article 7. Armenia strongly supported the power of the Prosecutor to act *proprio motu*, and believed that option 1 in article 12 contained sufficient safeguards, with the procedure for screening of requests by the Pre-Trial Chamber. It also supported the inclusion of article 6, paragraph (c), in the Statute.

24. Concerning the role of the Security Council, Armenia supported option 3 in article 10. However, it might be able to accept a revised option 1 with tighter time limits and the addition of a provision to ensure preservation of evidence and protection of witnesses. Armenia also supported the proposal by the Netherlands and New Zealand that any request for deferral pursuant to Chapter VII of the Charter should take the form of a resolution, so as to ensure transparency.

25. **Ms. LA HAYE** (Bosnia and Herzegovina) said her delegation would have preferred the Court to have universal jurisdiction. However, for the sake of compromise, it could reluctantly accept option 1 in article 7, paragraph 1, with automatic jurisdiction over all core crimes. Options 3 and 4 in article 7 were unacceptable. She noted with concern that the discussion paper did not reflect the original option of an independent ex officio Prosecutor; however, her

delegation could accept option 1 for article 12 as a compromise solution. Article 16 was not acceptable in its present form.

26. Triggering of the Court's jurisdiction must not relieve the Security Council of its primary role in the maintenance of peace. The Council should have the power to trigger the jurisdiction of the Court with respect to situations in which one or more of the core crimes had been committed. Concerning its powers to suspend the Court's proceedings, her delegation could, as a compromise, accept option 1 for article 10, paragraph 2, with a provision to ensure protection of witnesses and preservation of evidence. A request to suspend an investigation should take the form of a resolution adopted by the Security Council under Chapter VII of the Charter.

27. **Mr. BAZEL** (Afghanistan) said his delegation favoured the deletion of article 6, paragraph (c), and of article 12. Concerning article 7, it supported option 3. It was in favour of inherent jurisdiction for the crimes of genocide and aggression. It favoured article 7 *bis*, subject to the reservation it had expressed on treaty crimes. It supported paragraph 1 *bis* in article 8. It favoured option 1 in paragraph 1 of article 10, limiting the role of the Security Council to that provided for under Chapter VII of the Charter. It had no problem with option 1 in paragraph 2, but favoured a period of six rather than twelve months, with only one renewal to be permissible. His delegation also supported the Belgian proposal concerning preservation of evidence. With regard to article 11, it favoured option 2.

28. **Mr. NEGA** (Ethiopia) said his delegation supported option 2 in article 6 and consequently, regarding the *proprio motu* power of the Prosecutor, option 2 for article 12. On acceptance of the jurisdiction of the Court, it supported an "opt-in" approach. On the preconditions required for the exercise of jurisdiction by the Court, subject to its position on article 6 (c), it supported option 1 in article 7.

29. Ethiopia supported option 1 for paragraph 1 of article 10, which it took to mean that the Court would have jurisdiction over the crime of aggression once the Security Council had determined the existence of an act of aggression. In that connection, he reiterated Ethiopia's view that the crime of aggression should be included in the Statute. The General Assembly should also have the power to refer cases to the Court. Any power of deferral conferred on the Security Council should not lead to undue delay in the Court's proceedings or compromise its independent and effective functioning. Ethiopia therefore favoured option 2 for paragraph 2 of article 10, with a shorter period not exceeding six months, renewable for not more than six months, to be decided by formal resolution of the Council. Finally, he again emphasized the importance of the principle of complementarity in articles 15 and 16 as currently formulated.

30. **Mr. HADI** (United Arab Emirates) said his delegation found it difficult to accept automatic jurisdiction. It therefore supported article 7 *bis* on the need for express acceptance by States of the jurisdiction of the Court over the three core crimes. It also supported the role of the Security Council under the Charter in respect of the crime of aggression but did not believe that the Council should be able to interfere with the Court's jurisdiction. The General Assembly should have the same power as the Security Council to refer situations to the Prosecutor. The Prosecutor should not have the power to initiate investigations *proprio motu*, and article 12 should thus be deleted. As for admissibility, an alternative formulation of article 15, consistent with the principle of complementarity, was needed. Article 16 was acceptable in principle.

31. **Mr. AL-AMERY** (Qatar) said his delegation was in favour of option 1 of article 7, as a satisfactory compromise on acceptance of jurisdiction. Concerning the Prosecutor, it supported option 1 for article 12, with the term *proprio motu* replaced with the term ex officio. The Court must be protected from any pressures that would

undermine its independence and impartiality. The Security Council's role should thus be limited to initiating the proceedings under Chapter VII of the Charter in option 1 of article 10.

32. **Ms. REFFI** (San Marino) said her delegation strongly supported automatic jurisdiction, as essential to a really effective court. With regard to preconditions to the exercise of jurisdiction, it favoured option 1 in article 7. The Prosecutor should be empowered to act *proprio motu*. San Marino thus favoured the inclusion of article 12, which also provided sufficient safeguards, notably in the form of the Pre-Trial Chamber. Regarding the role of the Security Council in relation to crimes other than aggression, the best solution would be to avoid any interference by the Council in the functions of the Court. It might, however, be possible to compromise on a solution which provided a proper balance between the two bodies.

33. **Mr. MWANGI** (Kenya) said his delegation was prepared to support automatic acceptance by States of jurisdiction over the core crimes upon ratification. On preconditions to the exercise of jurisdiction, it preferred option 1 for paragraph 1 of article 7. Article 7 *ter* on acceptance by non-States parties was also necessary. Kenya continued to doubt the desirability of conferring *proprio motu* powers on the Prosecutor particularly because of the danger that pressure might be exerted on him or her to act or not to act, to the detriment of his or her independence. However, it would not stand in the way of consensus on that issue.

34. Option 1 for paragraph 2 of article 10, on deferral, represented a necessary balance that recognized the current state of international law with regard to the primary responsibility of the Security Council regarding international peace and security. However, the period of twelve months should be reduced to six, with the possibility for one six-month extension. On the Council's role with regard to the crime of aggression, Kenya preferred option 1 for paragraph 1 of article 10.

35. **Mr. GONZALEZ GALVEZ** (Mexico) said it was essential for the Court to have automatic jurisdiction over those crimes on which there was general agreement. That did not mean that some crimes might not fall within an "opt-in" regime. Option 1 for article 7 was the most promising, subject to certain amendments. Its paragraph 1 (b) should be amended by the addition of the words "in accordance with international law", to exclude the possibility of nationals of one country being kidnapped and brought before the courts of another country in violation of the rights of the territorial State.

36. On the Security Council, the most serious concern was deferral of the Court's consideration of a case. Mexico had circulated an informal paper on that question, containing a revised version of the Spanish proposal on the same matter. Concerning referral by the Security Council, practice had shown that there was a residual power of the General Assembly to act on the basis of Chapter VII. Furthermore, situations should be referred to the Court by the Council pursuant to article 27, paragraph 2, of the Charter; in other words, they should constitute a procedural matter not subject to veto by the permanent Members.

37. In article 16, the sentence beginning "At the request of that State, the Prosecutor shall defer to" should be restated in more affirmative terms. Lastly, in article 15, paragraph 3, the word "partial" should be replaced by "substantial", since the "partial" collapse of a judicial system would be difficult to determine in practice.

38. **Ms. PLEJIĆ-MARKOVIĆ** (Croatia) expressed great concern over the omission of the proposal of Germany, which reflected widespread views on the need for automatic jurisdiction. It was far from certain that automatic jurisdiction would limit States' participation. A weak court would be worse than no court at all. Her delegation rejected the idea of an "opt-in" or "opt-out" approach or, worse still, a State consent regime. The Prosecutor should be able to act ex officio. The Security Council should have no role, except in relation to the crime of aggression. On

the issue of deferral, Croatia feared that the proposed twelve-month period might provide sufficient time for Governments to conceal traces of crimes. More safeguards were needed. Finally, Croatia saw no need for article 16, which would be a further obstacle to the work of the Prosecutor.

39. **Mr. RHENAN SEGURA CARMONA** (Costa Rica) said that States' acceptance of the jurisdiction of the Court should be automatic by virtue of their ratification of the Statute. His delegation favoured inclusion of the crimes listed in article 5, although it did not agree to the use of the word "systematic" to qualify crimes. Article 7 *bis*, which provided for optional participation, was unacceptable. Costa Rica was in favour of conferring ex officio powers on the Prosecutor and supported the idea of a Pre-Trial Chamber. The Court should be an autonomous and independent body, and the Security Council should therefore intervene only in respect of the crime of aggression. Costa Rica would support a solution that respected the independence of the Prosecutor and struck a proper balance between the roles of the Court and the Council, such as those proposed by the delegations of Spain and Mexico. Lastly, in the interests of consensus his delegation would support article 15 as currently drafted.

40. **Mr. MIRZAEE YENGEJEH** (Islamic Republic of Iran) said that automatic jurisdiction should be limited to the crime of genocide. The wording of article 7, paragraph 2, should reflect that preference. Article 7 *bis* should be the basis for the jurisdiction of the Court over the remaining crimes.

41. As for the role of the Security Council, his delegation favoured the deletion of article 10 *in toto*, preferring a parallel role for the Court in the determination of aggression, to enable it to act in case of failure by the Security Council to discharge its responsibilities.

42. His delegation was not convinced that conferring *proprio motu* powers on the Prosecutor would serve any useful purpose. It seemed inconceivable that where crimes covered by the Statute were committed, States themselves would fail to react. His delegation thus supported the deletion of article 6, paragraph (c), and article 12. On State consent, it preferred option 4 in article 7. Lastly, the principle of complementarity, essential to the smooth functioning of the Court, must be clearly defined; and articles 15 and 16 provided a good basis in that regard. However, paragraph 2 (c) of article 15 needed some amendment to bring it into line with that principle.

43. **Mr. PRANDLER** (Hungary) said his delegation favoured automatic jurisdiction over all core crimes, and therefore supported option 1 in article 7 and article 7 *ter*. The Prosecutor should have the power to initiate proceedings *proprio motu*, and paragraph (c) of article 6 should thus be retained. Article 15 struck a delicate balance on the important issue of complementarity. Hungary did not favour article 16, but might be able to accept it if a compromise proved necessary. Concerning the role of the Security Council, it was in favour of option 1 in both paragraphs of article 10. Lastly, he noted that article 10 omitted to mention the important issue of referral of situations by the Security Council acting under Chapter VII of the Charter, which was, however, mentioned elsewhere, in paragraph (b) of article 6.

44. **The CHAIRMAN** said that consideration of the Bureau discussion paper on Part 2 (A/CONF.183/C.1/L.53) was thus concluded.

The meeting rose at 7.30 p.m.

The meeting was called to order at 3.15 p.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (*continued*) (A/CONF.183/2/Add.1 and Corr.1; A/CONF.183/C.1/L.45/Add.2 and L.57; A/CONF.183/C.1/WGP/L.14/Add.2; A/CONF.183/C.1/WGPM/L.2/Add.5)

Parts 5 and 6 of the draft Statute (continued)

1. **Ms. FERNANDEZ de GURMENDI** (Argentina), Coordinator of the Working Group on Procedural Matters, introducing the Working Group's report (A/CONF.183/C.1/WGPM/L.2/Add.5), said it was transmitting to the Committee for consideration paragraph 1 (c) of article 54 *bis* and article 72. Paragraph 4 of article 72 had been deleted. The footnote to paragraph 1 of that article was also to be deleted in the light of the fact that a proposal for a new paragraph was currently awaiting discussion.

2. **The CHAIRMAN** said that if he heard no objection he would take it that the Committee wished to refer the provisions contained in the report, as orally amended, to the Drafting Committee.

3. *It was so decided.*

Part 4 of the draft Statute (continued)

4. **Mr. RWELAMIRA** (South Africa), Coordinator, introducing his report on Part 4 of the draft Statute (A/CONF.183/C.1/L.45/Add.2), drew attention to the new text being recommended for article 37, paragraph 1. That text would have implications for paragraph 5 (a) of article 37, which had already been submitted to the Drafting Committee, and which would now need to be amended so as to specify that the number of judges of the Court was 18. Paragraph 4 *bis*, as now worded, would entail the consequential deletion of the words "[on each of the lists referred to in paragraph 4 *bis*]" from paragraph 8 (b) of article 37. The words "violence against women and children", in paragraph 7 (2), should be amended to read "violence against women or children". In article 40 a footnote should be added at the end of paragraph 1, to read: "Some delegations expressed the view that the predominance of judges with criminal trial experience should be reflected in the composition of Chambers."

5. One paragraph of article 49 was still pending, and would be transmitted to the Committee at a later stage.

6. **Mr. KROKHMAL** (Ukraine) said his delegation welcomed the text of article 37 submitted in document A/CONF.183/C.1/L.45/Add.2, which was a significant improvement on the original text proposed by the Preparatory Committee. However, it was extremely important that the principle of equitable geographical representation should be applied not only at the candidate selection stage but also at the stage of the elections proper. The text of paragraph 1 of article 37 as originally submitted by the Preparatory Committee had included a bracketed wording providing for a figure to serve as a criterion for equitable geographical representation. That provision had been omitted from the text proposed by the Coordinator, and should be reinstated. Accordingly, his delegation, together with the delegations of Belarus and Kazakhstan, was submitting a draft resolution on the question (document A/CONF.183/C.1/L.57), which he urged the Committee to support.

7. **Mr. CHUKRI** (Syrian Arab Republic) said he wished it to be recorded that his delegation strongly opposed paragraph 4 *bis* of article 37, and also the consequential amendment to paragraph 8 (b).

8. **The CHAIRMAN** asked if he could take it that the Committee agreed to refer the provisions contained in the report of the Coordinator, as orally amended, to the Drafting Committee.

9. *It was so decided.*

Part 7 of the draft Statute (*continued*)

10. **Mr. FIFE** (Norway), Coordinator of the Working Group on Penalties, introducing the Working Group's report (A/CONF.183/C.1/WGP/L.14/Add.2), said it was transmitting to the Committee for consideration article 75, paragraph 1. In that connection, he drew attention to a footnote indicating that the adoption of the paragraph was without prejudice to the the issue of the inclusion or the non-inclusion of the death penalty, and also without prejudice to the structure of article 75. The Working Group also transmitted for consideration article 77, paragraph 3.

11. **The CHAIRMAN** said that if he heard no objection, he would take it that the Committee wished to refer the provisions contained in document A/CONF.183/C.1/WGP/L.14/Add.2 to the Drafting Committee.

12. *It was so decided.*

The meeting rose at 3.35 p.m.

The meeting was called to order at 10.20 a.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (*continued*) (A/CONF.183/2/Add.1 and Corr.1; A/CONF.183/C.1/L.45/Add.3, L.59 and Corr.1 and L.61; A/CONF.183/C.1/WGAL/L.2; A/CONF.183/C.1/WGE/L.14/Add.1; A/CONF.183/C.1/WGPM/L.2/Add.6)

Part 2 of the draft Statute (*continued*)

Proposal prepared by the Bureau

1. **The CHAIRMAN** invited the Committee to begin consideration of the proposal for Part 2 prepared by the Bureau and contained in document A/CONF.183/C.1/L.59 and Corr.1, some of whose provisions repeated or modified those contained in document A/CONF.183/C.1/L.53. Ways must now be found of resolving a number of hitherto intractable issues. It was not enough merely to advocate inclusion of elements in the Statute, without also giving thought to the problems that would result from their inclusion.

2. The Bureau invited comments on five specific issues: acceptance of the jurisdiction of the Court, automatic or opt-in; preconditions for the exercise of jurisdiction; the options for suspension of investigation or prosecution by the Security Council; the desirability of additional safeguards for the Prosecutor's role; and the desirability of a provision—binding or otherwise—on elements of crimes.

3. **Mr. van HEBEL** (Netherlands), Coordinator, introducing document A/CONF.183/ C.1/L.59, said that with respect to article 5 the Bureau proposed that the jurisdiction of the Court should be limited to genocide, crimes against humanity and war crimes. If no agreement was reached in the course of that day as to whether the crime of aggression and one or more of the treaty crimes should be included, the interest in addressing those crimes might have to be reflected in some other manner.

4. Inclusion of crimes of sexual violence under crimes against humanity and war crimes was taken for granted. However, differences remained as to the drafting of the relevant provisions. Certain proposals made on the inclusion of terrorism and economic embargoes under crimes against humanity also required further discussion.

5. Two options were proposed for the *chapeau* of article 5 *quater*, dealing with the Court's jurisdiction in respect of war crimes. Section B of the definition of war crimes contained a new paragraph (a *ter*) relating to United Nations and other personnel involved in humanitarian assistance or peace-keeping missions.

6. Paragraph (o), on weapons, was based on the first of the three options contained in the corresponding provision in discussion paper A/CONF.183/C.1/L.53, and contained a short list of weapons generally considered to be prohibited in international armed conflicts. Subparagraph (vi) of paragraph (o), on weapons that might subsequently be prohibited in accordance with the articles on amendments and on review procedure, might require further drafting.

7. The *chapeau* of section D, on internal armed conflicts, had been amended, and a higher threshold was now proposed with respect to what should be considered an armed conflict not of an international character. Paragraph (e) had been deleted, as it duplicated paragraph (b) in section C. In paragraph (f), the words "or groups", which had

been inadvertently omitted, should be inserted after the words "armed forces". Section D now concluded with a clause stating that nothing in sections C and D affected the responsibility of Governments to maintain or re-establish law and order by all means consistent with international law. The drafting of a new provision, article xx, on "Elements of crimes", might require further clarification or improvement.

8. Articles 6, 7, 7 *bis* and 7 *ter* related to the acceptance and exercise of jurisdiction. Jurisdiction involved three stages: acceptance, preconditions, and exercise proper. The first stage was covered in article 7 *bis*, which contained two options. Option 1 provided for automatic jurisdiction over all three core crimes, without the need for any extra measure or declaration on the part of the State party. Option 2 provided for automatic jurisdiction over genocide and opt-in for crimes against humanity and war crimes.

9. As to preconditions for the exercise of jurisdiction, the second stage, under article 7, paragraph 1, the Court would be able to exercise jurisdiction over genocide if one or more of the States mentioned in its subparagraphs (a) to (d) had accepted its jurisdiction. However, there were three options with respect to preconditions for crimes against humanity and war crimes. Option 1 was identical to the proposal relating to the preconditions for genocide. Option 2 required a higher threshold, because the Court would have jurisdiction only if both the territorial State and the custodial State had accepted that jurisdiction. Option 3 required only the State of nationality of the accused to have accepted jurisdiction. However, if the State in question was not a party to the Statute or had not accepted jurisdiction, then under article 7 *ter* it could by declaration consent to the exercise of jurisdiction with respect to the crime in question.

10. As to exercise of jurisdiction, the third stage, under article 6 (a) taken in conjunction with article 11, the Court could exercise jurisdiction if a situation was referred to it by a State party. Under article 6 (b) the Security Council, acting under Chapter VII of the Charter, could refer such a situation to it. Under article 6 (c), the Prosecutor could initiate an investigation in accordance with article 12.

11. Article 10 concerned not the Security Council's role in referring a matter or situation to the Court but its power of requesting the suspension of an investigation or prosecution if an issue under Chapter VII arose that was also the subject of an investigation or prosecution by the Court. Of the options, one provided for a period of twelve months for which a suspension might apply, while a second provided for "a specified period of time", but did not specify its duration.

12. Article 12 provided for two options in relation to the role of the Prosecutor in initiating investigations *proprio motu*. A version of option 1 had already featured in discussion paper A/CONF.183/C.1/L.53. Option 2 raised the general question of whether additional safeguards were needed before the Prosecutor could act.

13. **Mr. HAFNER** (Austria), speaking on behalf of the European Union and its member States, said that the Union strongly supported the procedure adopted in the Bureau proposal as the most appropriate way of achieving a compromise on a number of very difficult issues. It noted that the Bureau had not yet been able to find a way of including the crime of aggression in the draft Statute but would propose that the interest in addressing that crime should be reflected in some other manner. The European Union was of the view that the issue could best be dealt with either directly in the Final Act or in a resolution attached to it.

14. As to the *chapeau* of article 5 *quater*, on war crimes, the European Union supported the formulation contained in option 2. Section D of article 5 *quater* was preceded by a reference to armed conflict between armed forces and dissident armed forces or other organized armed groups. That reference needed also to cover conflicts in which only organized armed groups were engaged, regardless of whether they exercised control over territory.

15. The new article xx, on elements of crimes, should be seen as an effort to achieve a compromise. The European Union considered that elements of crimes should take the form of guidelines, so as not to pose an obstacle to the entry into force of the Statute. In the light of the two footnotes to that article, some redrafting would clearly be required.

16. Article Y met with the European Union's full support. As to article 10, option 1, based on the Singapore proposal, seemed to strike the right balance between opposing views. However, the European Union also favoured inclusion of language specifying the need for preservation of evidence and other precautionary measures. It also remained convinced that the independence of the Prosecutor must be preserved.

17. **Mr. MIRZAEE YENGEJEH** (Islamic Republic of Iran), speaking on behalf of the member countries of the Movement of Non-Aligned Countries, said that those countries were disappointed that the Bureau proposal contained no provision or option concerning the crime of aggression. Many of the difficulties that would allegedly result from its inclusion seemed merely to be pretexts for excluding that "mother of crimes"—which had been recognized by the Nuremberg Tribunal some fifty years previously—from the Statute. The Conference owed it to future generations to ensure that both aggression and the use of nuclear weapons were included as crimes in the Statute, as called for in the Cartagena Declaration of May 1998.

18. **Mr. CAFLISCH** (Switzerland) said that Switzerland saw no need for a threshold limiting jurisdiction over war crimes, but was willing, in a spirit of compromise, to accept option 2 in article 5 *quater*, despite its regret at the elimination of option 3, which had commanded far more support than option 1. Switzerland also regretted the deletion of its preferred option concerning prohibited weapons, the raising of the threshold for section D of article 5 *quater*, and the inclusion in sections C and D of additional reservations concerning the re-establishment of law and order and the defence of territorial integrity.

19. All those changes were clearly intended to restrict the Court's jurisdiction. If they were the price that must be paid for a system of automatic jurisdiction, inherent and unconditional, along the lines of the model proposed by the Republic of Korea, that price would perhaps be worth paying. However, Switzerland could not endorse the adoption of some other model, particularly if it took the form of an opting-out mechanism for war crimes. It also had the gravest reservations regarding the new article xx. It was particularly concerned that elements of crimes seemed to have ceased to play a purely indicative function.

20. In accepting the definitions of crimes proposed by the Bureau, his delegation would have to make concessions on matters to which it attached great importance—something it would be willing to do if the Court were to have automatic jurisdiction over all three core crimes. In that case, however, the only acceptable option for article 7 *bis* was option 1. As for article 7, his delegation called for the adoption of option 1 with regard to crimes against humanity and war crimes, and also for the replacement of the words "the State that has custody of the accused/suspect" with the words "the State on whose territory the accused/suspect is present". The requirement in option 3 of article 7 that the State of nationality of the accused or suspect must accept the jurisdiction of the Court would have the consequence that nationals of a non-State party would be outside the jurisdiction of the Court regardless of their whereabouts; whereas currently they were subject to the jurisdiction of States other than their own as soon as they crossed their national frontiers. Acceptance of option 3 would lead to an absurd situation in which such persons would be subject to foreign courts but not to the International Criminal Court. That option must thus be firmly rejected.

21. As to article 10, in a spirit of compromise Switzerland could accept option 1, provided that proper account was taken of the need for preservation of evidence. However, it could not accept option 2, as the duration of the

suspension established therein was not specified. On article 12, it favoured option 1. The procedures laid down in article 16 were extremely cumbersome and would seriously impair the effectiveness of the system: article 16 was thus unacceptable.

22. **Mr. SCHEFFER** (United States of America) said that the threshold for war crimes was a critical issue for many delegations. Not all war crimes were necessarily very serious: isolated violations of the Geneva Conventions, however gross, did not justify referral to the Court. His delegation had heard no persuasive argument that option 2 would prevent the prosecution of an individual war crime that fell below the threshold the Court should be addressing.

23. With regard to paragraph (o) of article 5 *quater*, subparagraph (vi) was an improvement on previous versions, but the treatment of additions to the prohibited weapons list was still too ambiguous. It must be made clear that any changes to the list must be approved by all States to whose nationals it would apply, under an appropriate mechanism in article 110. The term "inherently indiscriminate", which appeared in the *chapeau* to paragraph (o), was not grounded in Hague Law and should be avoided.

24. The United States noted the changes made to the *chapeaux* of sections C and D in an endeavour to facilitate consensus. It believed, however, that the change raising the threshold of applicability of section D to that of Protocol II to the Geneva Conventions should be rejected. The bulk of armed conflicts encountered in the real world were non-international, and that change would send the wrong message to civilian victims of internal armed conflicts.

25. His delegation was dismayed that the issues of gender justice dealt with in subparagraph (p *bis*) remained unresolved at that late stage in the Conference. It was also concerned that under paragraph 2 of article xx, elements of crimes would be adopted only after the entry into force of the Statute. Elements of crimes should be negotiated and adopted by the Preparatory Commission, so as to encourage early ratification by as many States as possible.

26. Paragraph (f) of section B should ideally not be included in the Statute. If it was to be included, the words "directly or indirectly", which were not drawn from Protocol I to the Geneva Conventions, should be deleted.

27. On article 7, the section dealing with preconditions for exercise of jurisdiction over genocide had only one option, to which his delegation objected strongly in principle, because it allowed the Court to exercise jurisdiction over the nationals and official acts of non-States parties, also contradicting the purpose of article 7 *bis* and its reference to automatic jurisdiction for genocide. Likewise, his delegation continued to reject option 1 of article 7 regarding preconditions for crimes against humanity and war crimes. The only approach consistent with well-established principles of international law was to combine options 2 and 3, so that the Court would have jurisdiction over the nationals and official actions of non-States parties only with the consent of the State of which the accused or suspect was a national and the State in the territory in which the crime had occurred.

28. As to article 7 *bis*, option 2 offered the most realistic and acceptable alternative. It could however be improved by making it clear that case-by-case consent to jurisdiction was also a possibility. With regard to article 10, his delegation did not believe that a specific time limitation could be imposed by a treaty separate from the Charter of the United Nations. Option 2 was thus to be preferred. As to articles 6 and 12, a substantial number of countries were completely opposed to the Prosecutor acting *proprio motu*, and those proposals should thus be deleted. Lastly, his delegation continued to support the inclusion of article 16 in the Statute.

29. **Mr. CHUKRI** (Syrian Arab Republic) said that his delegation strongly supported the statement by the representative of the Islamic Republic of Iran on behalf of the Non-Aligned Movement concerning the crime of

aggression, inclusion of which was supported by over a hundred States, and which had been described by the Nuremberg Tribunal as the supreme international crime. The fact that no comprehensive definition had been found did not justify eliminating that crime entirely, or placing it on the same footing as the treaty crimes. Unless the crime of aggression was included, his delegation might have to reconsider its position with regard to the Statute as a whole.

30. Many proposals submitted with regard to the role of the Security Council were not properly reflected in the Bureau proposal. If it was to be left to the Security Council, with its notorious right of veto, to determine what matters were to be referred to the Court, the latter's independence would be severely compromised.

31. Although Singapore's amended proposal, reflected in option 2, perhaps offered a solution to the problem of the Court's jurisdiction, a unified approach to all crimes was called for. If the Court did not have automatic jurisdiction over all crimes to be included in the Statute, the State of nationality would have the right to block the Court. His delegation thus supported article 7 *ter* and option 1 for article 7 *bis*.

32. Article xx, concerning elements of crimes, would create an unacceptable precedent, whereby unresolved problems were consigned to an annex in the interests of meeting the deadline for finalization of the Statute. It must also be asked what role would be left to the Court itself if the Statute were to lay down the elements of every crime. The relationship between the Charter of the United Nations and the Statute of the International Court of Justice offered a salutary example in that regard; determination of the elements of the crime should be left to the Court.

33. With regard to internal conflicts, his delegation continued to oppose section D and to support section C, provided that the threshold was modified. It was also dismayed to find that, contrary to the wish of the vast majority of States present and in disregard of the Cartagena Declaration of May 1998, nuclear weapons had been eliminated from the Statute. It was incomprehensible that while chemical and biological weapons were prohibited, the most pernicious of all weapons were to be excluded from the scope of the Statute.

34. **Mr. LAHIRI** (India) said that the Bureau proposal made little effort to address several of his delegation's most serious concerns. First, the draft continued to insist on the Security Council having the power to bind States not parties to the Statute. As the Council would almost certainly include non-States parties among its members, that provision would confer on such States the power to compel both States parties and other non-States parties to submit to the Court's jurisdiction, in violation of the law of treaties, as well as conferring on the Council a role never envisaged for it by the Charter.

35. Secondly, nuclear weapons were excluded from the list of weapons whose use was considered inherently indiscriminate, on the grounds that their exclusion would ensure the widest possible acceptance of the Statute. That was a shameful compromise. The International Court of Justice, in its Advisory Opinion on the question, had confirmed that the use of nuclear weapons would be a contravention of international humanitarian law; and the fact that no convention banning their use had been negotiated did not mean that the Statute could ignore their existence.

36. Thirdly, while his delegation could accept automatic jurisdiction for genocide, it would insist on opt-in jurisdictions for all other crimes. As safeguards against interference by the Court, the territorial State and the State of custody must give their consent before it could exercise its jurisdiction. The complementarity provisions must also be strengthened. Nor did his delegation accept *proprio motu* powers for the Prosecutor: only States parties should have the power to refer situations to the Court.

37. India continued to believe that the Court should not have jurisdiction over internal armed conflict except where a State's administrative and legal machinery had ceased to function. Lastly, his delegation found it incomprehensible

that the Statute should fail to address terrorism and drug trafficking—truly international crimes that had taken more lives than the so-called core crimes in recent decades. India reserved the right to table formal amendments on all those concerns when the Committee of the Whole met to adopt the draft Statute for referral to the Plenary.

38. **Mr. COUGHLIN** (Holy See) said there was an urgent need for some international juridical body to exercise jurisdiction over international drug trafficking, an organized criminal activity with which national Governments found themselves ill-equipped to cope. His delegation was also deeply concerned about the illegal arms trade carried on by organized criminal groups, which increased the likelihood of international and internal armed conflict and resulted in the destruction of national structures and cultures. The Holy See strongly endorsed the Bureau proposal that those crimes should be placed under the jurisdiction of the Court by a subsequent protocol or review conference.

39. With respect to article 12, his delegation favoured a strong and independent Prosecutor, and believed that the Statute as a whole provided for adequate safeguards against possible abuses of prosecutorial power. It was also confident that only individuals of the highest moral principles and ethical conduct would be chosen to serve as Prosecutor and that the appointment process would rise above narrow political and ideological concerns. The process for bringing an accused person to justice must include the right to competent legal counsel—free of charge where appropriate. In addition, as the Rules of Procedure and Evidence were drafted, more specific language should be developed to protect such fundamental rights as specific notice of the charges, availability of all evidence, adequate time and resources to prepare the defence, cross-examination of all witnesses, admissibility of evidence and protection of customary privileges.

40. **Mr. LIU Daqun** (China) said that his delegation preferred option 1 for the *chapeau* of article 5 *quater* and that, as currently worded, paragraph (o) of section B did not meet its concerns. The addition of safeguards in section D was welcome, but his delegation had difficulty in accepting paragraphs (d), (f), (h), (j) and (k); the safeguards contained in sections C and D should reproduce the wording of article 3 of Protocol II to the Geneva Conventions.

41. With regard to the preconditions to the exercise of jurisdiction over genocide in article 7, China could accept the possibility of automatic jurisdiction. However, for non-States parties, the consent of the State of nationality and of the territorial State should be required. As for preconditions in the case of crimes against humanity and war crimes, there should be opt-in jurisdiction, with consent of the State of nationality and the territorial State. Consequently, a compromise between options 2 and 3 was needed.

42. On article 7 *bis*, his delegation favoured option 2. On article 7 *ter*, it favoured deletion of the second sentence, as the problem of cooperation was covered in Part 9 of the Statute. His delegation was still engaged in consultations regarding article 10; option 2 might be acceptable if its drafting were improved. In his delegation's view, article 12 should be deleted.

43. **The CHAIRMAN** invited the Committee to turn to consideration of the reports of the Working Groups and Coordinators.

Parts 5, 6 and 8 of the draft Statute (*continued*)

44. **Ms. FERNANDEZ de GURMENDI** (Argentina), Coordinator for Parts 5, 6 and 8, introducing the report of the Working Group on Procedural Matters in document A/CONF.183/C.1/WGPM/L.2/Add.6, said that the report transmitted for consideration article 57 *bis*, paragraph 3 (d) and (e), article 58, paragraph 5, and the complete text of article 60, paragraph 2, from Part 5; article 67, paragraph 1 (a) and (f) and paragraph 2, article 68, paragraphs 3,

4, 5 and 7, and article 69, paragraphs 1 and 4 *ter*, from Part 6; and article 81, paragraph 1 (e), from Part 8. It also announced the deletion from Part 6 of article 68, paragraphs 8 and 9, and of article 69, paragraph 7.

45. **The CHAIRMAN** said that, if he heard no objection, he would take it that the Committee of the Whole wished to refer to the Drafting Committee the articles contained in the report of the Working Group.

46. *It was so decided.*

Article 20

47. **Mr. SALAND** (Sweden), Coordinator for Article 20, introducing the report of the Working Group on article 20, "Applicable law" (A/CONF.183/C.1/WGAL/L.2), said that the Working Group had reached agreement as to article 20, paragraphs 1 and 2, which it now transmitted to the Committee for consideration. Discussions were still pending on paragraph 3.

48. **The CHAIRMAN** said that, if he heard no objection, he would take it that the Committee of the Whole wished to refer to the Drafting Committee the articles contained in the report of the Working Group.

49. *It was so decided.*

Article 49

50. **Mr. RWELAMIRA** (South Africa), Coordinator for Part 4, said it would be seen from document A/CONF.183/C.1/L.45/Add.3 that article 49, paragraph 1, the last outstanding article in Part 4, dealt with the privileges and immunities of the Court. The paragraph covered immunities relating to assets, properties of the Court, archives and communications of the Court. The view had been taken in the informal consultations that the matter would need further discussion and elaboration, preferably within the Preparatory Commission. He commended the article to the Committee of the Whole for consideration and transmission to the Drafting Committee.

51. **The CHAIRMAN** said that, if he heard no objection, he would take it that the Committee of the Whole wished to refer article 49 to the Drafting Committee.

52. *It was so decided.*

Articles 94, 99 and 100

53. **Ms. WARLOW** (United States of America), Coordinator for Part 10, said that the report of the Working Group on Part 10, "Enforcement" (A/CONF.183/C.1/WGE/L.14/Add.1), referred to the Committee of the Whole article 94, article 99, paragraph 3, and article 100. She drew attention to the deletion of article 93 and of article 99, paragraph 2. The Working Group recommended those articles for consideration by the Committee and referral to the Drafting Committee. Consideration of one remaining article, article 101, was still pending.

54. **The CHAIRMAN** said that, if he heard no objection, he would take it that the Committee of the Whole wished to refer the articles contained in the report of the Working Group to the Drafting Committee.

55. *It was so decided.*

Preamble and Final Clauses

56. **Mr. SLADE** (Samoa), Coordinator for the Preamble and the Final Clauses, introducing document A/CONF.183/C.1/L.61, said that the fact that the entire text of the preamble was enclosed within square brackets reflected the need for further discussion. However, the current provision was accepted as the basis for further work. In the penultimate preambular paragraph, the square brackets in the word "relation[ship]" could now be deleted.

57. As to the Final Clauses, article 108 was recommended to the Committee for reference to the Drafting Committee. Article 109 still retained its four options. Article 110 also required final decisions, particularly as to the time periods referred to in paragraph 1 and the voting methods and majorities referred to in paragraphs 2 to 6. In the fourth line of article 110, paragraph 1, the eighth line of article 110 *bis*, paragraph 1, the second line of article 111, paragraph 1, and the third line of article 111, paragraph 2, the words "some other person" should be replaced with the words "such other person". Article 110 *bis* also needed to be finalized as to the time period and voting majorities. There was one outstanding issue relating to the time period in article 111, paragraph 1. Articles 112, 115 and 116 were ready for submission to the Drafting Committee. Article 113 was still the subject of consultations, and article 114 required decisions on the relationship between entry into force and the Rules of Procedure and Evidence, as well as on the number of required ratifications.

58. **Mr. P. S. RAO** (India) said that his delegation would require further consultations before it was able to endorse article 108.

59. **Mr. AL ADHAMI** (Iraq) said that his delegation also had reservations regarding article 108.

60. **The CHAIRMAN** said that, if he heard no objection, he would take it that the Committee of the Whole wished to refer articles 108, 112, 115 and 116, as orally amended, to the Drafting Committee, on the understanding that it might return to certain aspects thereof in due course.

61. *It was so decided.*

Part 2 of the draft Statute (continued)

Proposal prepared by the Bureau (continued)

62. **The CHAIRMAN** invited the Committee to resume consideration of the Bureau proposal for Part 2 contained in document A/CONF.183/C.1/L.59 and Corr. 1.

63. **Mr. ASAMOAH** (Ghana) said that aggression was the mother of war crimes and it was absolutely essential that the Statute should reflect that fact. As for nuclear weapons, their exclusion from the list of prohibited weapons rendered that list wellnigh meaningless. While accepting the Non-Aligned Movement's position with regard to the inclusion of other crimes, his delegation believed that, in the interests of securing a satisfactory outcome to the Conference, those crimes should be incorporated in the Statute at a later date.

64. His delegation had difficulty in understanding a number of passages in the Bureau proposal, on account of the way in which they were drafted. For instance, in article 5, the words "as such" preceding the enumeration of acts of genocide should presumably read "such as". In article 5 *ter*, paragraph 2 (a *bis*), the phrase "infliction of conditions of life" was incomprehensible.

65. On article 5 *quater*, concerning war crimes, his delegation favoured option 2. Regarding section B, it was somewhat concerned that the scope of paragraph (a *ter*) was restricted to activities in accordance with the Charter of the United Nations, as regional organizations were often also involved in such exercises. That provision should be expanded to take account of such situations.

66. His delegation found it hard to see what article xx was intended to achieve, as some elements of crimes had already been indicated in earlier proposals. With regard to preconditions to the exercise of jurisdiction over crimes against humanity and war crimes, his delegation favoured option 1, as it also did in article 7 *bis*. With regard to the role of the Security Council, it preferred option 2. However, whichever option was adopted, it would still be possible for the Security Council to repeat its request *ad infinitum*, thereby undermining the work of the Court. It might therefore be wise to specify some limit beyond which further requests by the Security Council would not be entertained.

67. With regard to article 12, his delegation favoured option 1. On article 16, it had difficulty in understanding the last sentence of paragraph 2, which referred to situations in which the Prosecutor was not aware that an investigation was taking place. How could the Prosecutor defer to investigations of which he or she was unaware?

68. **Mr. WESTDICKENBERG** (Germany) said that, like the United States delegation, his delegation continued to believe that the same standards should apply in section D as in section C of article 5 *quater*. It thus had reservations regarding the second part of the *chapeau* prefacing section D.

69. With regard to article xx, his delegation's position was that the principle of legality was fully ensured by the definitions of the three core crimes to be contained in the Statute, which had been meticulously worked out in a process that had taken several years, and that there was thus no need to embark on a new discussion. Neither the entry into force of the Statute nor the commencement of the Prosecutor's investigations should be dependent upon general agreement on, or even formal adoption of, so-called elements of crimes. Paragraph 4 of that article should thus either be deleted or made non-binding, for example, by amending the word "shall" to "should".

70. With regard to acceptance of jurisdiction, his delegation, like so many others, could not accept option 2 of article 7 *bis*, which would lead to an à la carte jurisdiction and would also confer on States parties all the benefits and privileges of membership without their concomitant obligations. An opt-in approach could have the further disadvantage of reducing the core crimes—which had already dwindled to three—to the single core crime of genocide. What was needed was the opposite approach—a uniform and coherent regime for all three core crimes. His delegation thus strongly advocated adoption of option 1.

71. With regard to article 7, Germany concurred with those States—a large majority—that found paragraph 1 and option 1 for paragraph 2 acceptable. In its view, option 3 would be an incentive for States not to become parties to the Statute. With regard to article 10, his delegation continued to support option 1. In article 12, it continued to regard option 1 as of crucial importance. Viable and effective safeguards already existed against frivolous investigations by a *mala fide* Prosecutor.

72. Article 15 must be retained in its entirety. Article 16, on the other hand, still required, at the very least, substantial amendment. With regard to paragraph 1, it should be sufficient to notify only the four States mentioned in the proposal of the Republic of Korea. The burden of challenge should lie, not with the Court, but with the State, which was much closer to the information. Furthermore, if a non-State party chose the challenge procedure, it would have in return to accept the obligation to cooperate fully with the Court. Pending the outcome of the consultations his delegation continued to reserve its position on article 16.

73. Lastly, his delegation deplored the fact that the efforts of a number of delegations over a period of two years to have the crime of aggression included in the Statute had proved vain. It noted with appreciation that the Bureau would if necessary propose that the interest in addressing that crime should be reflected in some other manner.

74. **Mr. SLADE** (Samoa) said that the relationship between articles 6, 7 and 7 *bis* raised fundamental difficulties which led to confusion. "Custody" jurisdiction and "custody ... with respect to the crime" were new concepts in international law that seemed fraught with possibilities for slippage. His delegation agreed with much that had been said by the delegation of Switzerland on that issue, and strongly supported inherent universal jurisdiction with no possibilities for opting in or opting out.

75. Section D, on non-international armed conflict, had been drained of much of its content. In particular, the reference to prohibited weapons seemed to have vanished. He understood why nuclear weapons had been forced out; but gone, too, was any reference to other devices. Did the Conference really want to send the message that it was acceptable to use poison, dumdum bullets, biological and chemical weapons in internal conflict?

76. Paragraph (o) came as a disappointment. Its *chapeau* was based on the premise of proscribing weapons in certain general categories; however, all that was left of those categories was a short list of absolutely prohibited weapons. Subparagraph (vi) of paragraph (o) was also void of operational effect. The reference made by some delegations to exploding bullets seemed to have been ignored. Article Y, however, was a crucial provision that his delegation welcomed. Article 10 was now much improved, and Samoa favoured its option 1. Elements of crimes had a useful role to play, if presented in the form of guidelines. Finally, his delegation strongly supported the provisions concerning the *proprio motu* power of the Prosecutor, which provided sufficient safeguards.

77. **Sir Franklin BERMAN** (United Kingdom) said that a successful outcome to the negotiations on article 5 must necessarily involve abandoning attempts to include therein aggression, the treaty crimes, and, indeed, nuclear weapons—notwithstanding the remark by one delegation which had grossly distorted the tenor of the Advisory

Opinion of the International Court of Justice on the question. The statement by the presidency of the European Union had indicated how the crime of aggression might be addressed once the Statute had been adopted.

78. As to the definitions, he endorsed other delegations' views about the wisdom of having a reasonably short list of proscribed weapons under section B, paragraph (o). However, the phrase "which are inherently indiscriminate", which had been included in the *chapeau*, seemed both factually incorrect and undesirable: it would, for example, have extremely restrictive consequences in relation to subparagraph (vi), which allowed for the inclusion of additional weapons in the future. It was perfectly possible that a decision might be taken to proscribe weapons on grounds other than their inherently indiscriminate nature.

79. The cluster of articles relating to exercise of jurisdiction was, as the representative of Ghana had noted, extremely confused and difficult to follow, and would require re-ordering along the lines suggested by the Coordinator. Further clarification was needed of the position of States not parties to the Statute. In that context, one must guard against a situation arising in which the operation of the Statute would be dependent on the consent of the very persons against whom the jurisdiction of the Court should be operating.

80. The notion of automatic jurisdiction with respect to core crimes was one to which his delegation was deeply attached, and the objective must be to create the greatest possible measure of automatic jurisdiction over the broadest reasonable definition of what constituted the core crimes. His delegation was gratified to note that very considerable progress was being made with regard to crimes in internal conflicts, under sections C and D in article 5. The *chapeau* to section D posed a problem: it was important to avoid setting a threshold so high as to remove from the Court's jurisdiction the very cases that had given rise to such grave concerns of late.

81. With regard to the clause at the end of section D, that clause was inspired by article 3 of Protocol II to the Geneva Conventions—indeed, one representative had asked for the whole of that article to be included. In his delegation's view, article 3 of Protocol II as worded was not suitable for inclusion in the Statute. But the ideas expressed therein were valuable ones, and their essence could be reproduced as part of the endeavour to ensure that the widest possible range of crimes in internal armed conflict fell within the jurisdiction of the Court.

82. With regard to article 10, the member States of the European Union saw option 1 as striking a proper balance. However, there was still room for drafting improvements, perhaps incorporating some elements of option 2, so as to capture both the inherent powers of the Security Council and the judicial independence of the Court.

83. **Ms. PLEJIĆ-MARKOVIĆ** (Croatia) said her delegation broadly endorsed the statement made by the representative of Austria on behalf of the European Union. However, on article 5, it continued to favour subsequent inclusion of the crime of aggression in the Statute at the review conference to be convened in accordance with article 111. On war crimes, its preference was for option 2. With regard to paragraph (o), it was concerned that landmines were not included in the list of proscribed weapons. On elements of crimes, it endorsed the comments of the representative of Germany. If article xx were adopted, its paragraph 4 should either be made non-binding or else deleted.

84. On the cluster of jurisdictional issues, Croatia favoured automatic jurisdiction in article 7 *bis*. On preconditions to the exercise of jurisdiction, it could accept paragraph 1, and it favoured option 1 in paragraph 2. Options 2 and 3 were completely unacceptable.

85. On the role of the Security Council, Croatia favoured option 1, provided that reference was made to the need for preservation of evidence. It also supported an independent prosecutor with *proprio motu* powers. The procedures under article 16 were too cumbersome, and the article should be deleted.

The meeting rose at 1.05 p.m.